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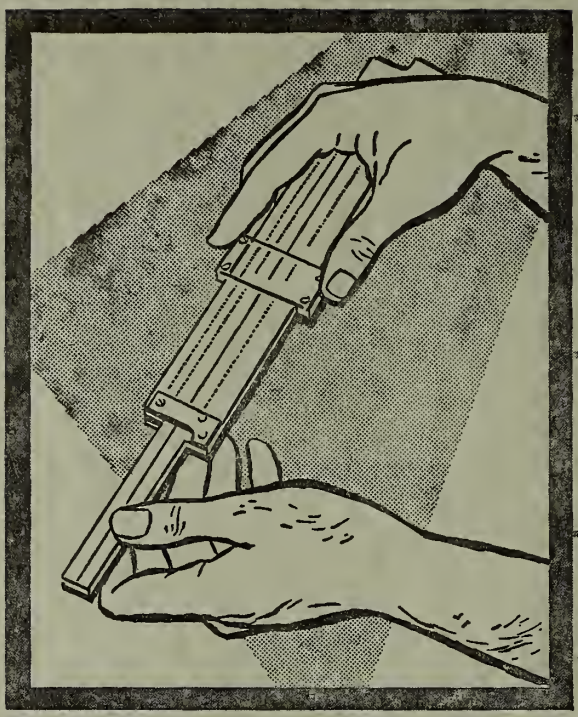

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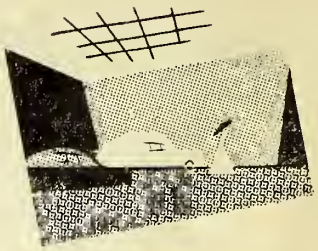

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Mississippi Law Journal

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THE RIGHTS OF A CREDITOR WITHOUT A JUDGMENT TO PROCEED IN CHANCERY AGAINST THE EQUITABLE ASSETS OF A NON-RESIDENT DEBTOR

*Thomas D. Bourdeaux**

A vexing problem in many jurisdictions is that of a creditor with a claim but no judgment against a non-resident debtor who has no property within the creditor's jurisdiction subject to legal process but who has equitable interests or assets within the jurisdiction of the creditor. That there is a conflict of authority is recognized by the legal writers.[1]

It is difficult to define an "equitable interest" except in its own terms. "An equitable interest is such an interest as a court of equity can pursue and appropriate to the discharge of debts."[2] Or, to put it another way, an equitable interest is that interest which cannot be reached by the ordinary process of law.

For the purposes of this discussion we can assume two situations:

1. Creditor *A* is a resident of Mississippi.[3] His debtor, *B,* is a non-resident of Mississippi. *B,* however, is the beneficiary of a deed of trust securing an indebtedness of his debtor, *C,* a resident of Mississippi, which deed of trust covers real property situated in Mississippi. *C* is insolvent and the deed of trust is hopelessly in default but *B* will not cause the deed of trust to be foreclosed so long as *A*'s claim is not barred by the statute of limitations. Can we not say that *B* has an equitable interest in the real property covered by the deed of trust? This interest is certainly not amenable to the ordinary process of law for even if *A* had a judgment against *B* he could not cause execution to be levied on this interest.

2. *A*'s debtor, *B,* is a non-resident owning real property in Mississippi which he voluntarily conveys to *C* in order to thwart *A*'s efforts to attach the property in chancery under the provisions of section 2729 of the Code.[4] *A* has no judgment on his claim. Can

*Attorney at Law, Meridian, Mississippi.

1 14 Am. Jur., *Creditors' Bills* § 38 (1938).

2 Leathwhite v. Bennet, 11 Atl. 29 (N.J. 1887).

3 *A*'s place of residence is of no material importance, since a non-resident would be afforded the same relief. Comstock v. Rayford, 9 Miss. (1 S. & M.) 423 (1843).

4 Miss. Code Ann. § 2729 (1942).

A successfully maintain a creditor's suit in chancery to set aside the fraudulent conveyance by *B* to *C* for the purpose of subjecting *B*'s interest in the property to *A*'s demand?

Without making a state-by-state survey, it can be generally stated, with little fear of successful contradiction, that equity would offer relief to the creditor in either of the two situations stated above in a majority of the jurisdiction in this country.[5]

In arriving at what appears to be the modern rule the courts have struggled for years to rid our jurisprudence of the idea that equity will offer a creditor no relief until he has obtained a judgment, has had execution issued thereon, and a nulla bona return. The early case of *Farned v. Harris*[6] squarely committed Mississippi to the position that there could be no equitable execution without first obtaining a judgment and a nulla bona return:

> "It will be seen that the complainant does not resort to [a court of chancery] to establish an equitable right, but to have equitable assets subjected to what is confessedly a legal right; in other words, to have what is regarded as an equity subjected to the satisfaction of a judgment. The power of a court of chancery is ample in such cases, but its authority is invoked only in aid of the execution process; hence the general rule is, where the object is to reach mere equitable assets, that an execution must be returned nulla bona. But the judgment in Alabama will not entitle the complainant to relief in aid of that judgment in this state. . . . It constitutes but a cause of action in this state. When the party obtains a judgment here, and fails to obtain satisfaction, it will then be time enough to call in the aid of a court of chancery, to subject the equitable assets of defendants."[7]

The remedies offered through the equity court to the creditor, *A*, in each of the examples stated above are the scope of this Article. It will deal primarily with *A*'s rights in Mississippi but will touch on the prevailing rule in other jurisdictions.

Mississippi Statutes

There are two Mississippi statutes which at least touch on the general question here involved. The first, section 2729 of the Code, provides that the chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether legal

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5 14 AM. JUR., *Creditors' Bills* § 38 (1938); 21 C.J.S., *Creditors' Suits* § 43 (1940); Annot., 38 A.L.R. 269 (1925).

6 19 Miss. (11 S. & M.) 366 (1848). See also Scott v. McFarland, 34 Miss. 363 (1857); Coleman v. Rives, 24 Miss. 634 (1852).

7 *Id.* at 371, 372.

or equitable, or whether liquidated or not, "against any non-resident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor."[8] Succeeding sections spell out one method by which the effects or indebtedness shall be bound[9] and the method in which the land shall be levied on.[10] It is obvious from a consideration of these sections that section 2729 is intended to and does apply only to property which can be reached by ordinary process. In fact, section 2731 states that the attachment writ shall be levied on land "by the sheriff or other officer as such writs at law are required to be levied on land, and shall have like effect." It is submitted, therefore, that the Mississippi statutes relating to attachment in chancery upon the filing of a creditor's bill do not apply to and cannot affect interests of the non-resident debtor which are of an equitable nature.

Protection is afforded under section 1327 of the Code[11] to a creditor whose rights are imperiled because a debtor has fraudulently conveyed his property so as to hinder, delay or defraud the creditor. This section has, since 1898,[12] relieved the creditor of the necessity of first obtaining a judgment at law and then having execution issued and a nulla bona return thereon before he may attack a fraudulent conveyance. The statute makes no provision for the situation where the debtor and fraudulent grantor is a non-resident and the writer has unearthed no decision where the issue of the debtor's non-residence was raised or the problem discussed.

Historical Survey of Cases

The Mississippi Supreme Court has dealt with the problem at hand on numerous occasions—principally prior to 1900. It would be well to consider briefly some of these decisions.

In *Folkes & McRea v. Hayden*,[13] the court said by way of dictum that "where there is some impediment, which may exist or be interposed to defeat or embarrass proceedings at law, then a court of equity may take jurisdiction of the question, and afford the desired relief."[14] The creditor, of course, had a judgment.

Later, in *Catchings v. Manlove*,[15] the Mississippi Supreme Court

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[8]Miss. Code Ann. § 2729 (1942).
[9]Miss. Code Ann. § 2730 (1942).
[10]Miss. Code Ann. § 2731 (1942).
[11]Miss. Code Ann. § 1327 (1942).
[12]Miss. Laws 1898, c. 64.
[13]29 Miss. 123 (1855).
[14]*Id*, at 126.
[15]39 Miss. 655 (1861).

considered a creditor's bill to set aside as fraudulent an assignment of certain life insurance policies made by a decedent debtor to his wife and children. It was argued that the statutes on fraudulent conveyances were not applicable to choses in action because they were not subject to levy of execution.[16] The court held:

> "The right of the creditor to subject the property of his debtor to the payment of his debt applies to whatever is in law the property of the debtor, except such parts of it as are specially exempted by law; and if this right be not available at law by reason of the nature or condition of the property, that is a sufficient reason why it should be enforced by a court of equity. It is upon this ground that a court of equity can subject equitable assets to the payment of debts, when the remedy at law has been exhausted and is ineffectual."[17]

In holding that the creditor could set aside the conveyances and subject the proceeds of the policies to his claim, the court ruled that creditors who had probated claims against the estate of a decedent were "judgment creditors" where the claims had been proved and allowed.

An interesting, although not unusual, theory regarding the manner in which a creditor might treat a fraudulent conveyance was advanced by the Supreme Court of Mississippi in *Pulliam v. Taylor*.[18] The court first stated the general rule then obtaining that a creditor could not, in equity, subject equitable assets, such as could not be taken by execution, until he had a judgment with a nulla bona return. It then held that inasmuch as the Statute of Frauds denounced as an absolute nullity a conveyance made with intent to defraud, a judgment creditor could proceed as though the conveyance had never been made and treat the title to the property involved as though it were still in the debtor, the fraudulent grantor.[19]

Two years later, the *Pulliam* case was followed by the court, but with an embellishment. In *Partee v. Mathews*,[20] the court pointed out that there was a distinction between legal and equitable assets as to the mode of reaching them by a judgment creditor. He must have a judgment, execution and nulla bona return as to equitable assets. But, if the property is legally liable to execution and the object is to remove a fraudulent conveyance, a judgment which constitutes a lien on the

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[16]Execution can be levied on choses in action today. MISS. CODE ANN. §§ 1906, 1910 (1942).

[17]Catchings v. Manlove, 39 Miss. 655, at 669 (1861).

[18]50 Miss. 551 (1874).

[19]Other courts have employed the same reasoning. See Smitherman v. Allen, 159 N.C. 17 (1860); First Nat'l Bank v. Randall, 20 R.I. 319, 38 Atl. 1055 (1897).

[20]53 Miss. 140 (1876).

property sought to be charged is sufficient.[21] The court then held that execution may be had on the property fraudulently conveyed without setting the conveyance aside or that an equity court may set it aside first to clear the title and enable the property to command a better price at the execution sale.

In the same year, 1876, the Mississippi court again considered the general question of equitable executions in *Fleming v. Grafton*.[22] The court's opinion set out a general proposition which is the foundation of the rule which obtains today in this state:

> "But there are two classes of cases in which a court of chancery relieves the creditor. The distinction between them is broad and marked, and the facts which make up the equity of the creditor are very different, and so is the reason on which jurisdiction is based. One class is, where the creditor comes to obtain satisfaction of his judgment out of the property of his debtor, which cannot be reached by execution at law; that is, where he proposes to appropriate equitable assets to the satisfaction of his judgment. The other is, where he has a right at law, the property being subject to final process, but he seeks the aid of a court of equity to remove some obstruction fraudulently or inequitably interposed to prevent or embarrass a sale under execution."[23]

One of the strongest statements of the power of a chancery court to give relief to a creditor regardless of statutory authority is found in *Norton v. Phelps*.[24] The suit was brought by the creditor of a non-resident and insolvent trustee to subject the corpus of a trust estate, previously delivered to the cestui que trust, to a demand on a stated account for supplies and money advanced the trustee for the plantation of the cestui que trust. The court held that the trust estate was chargeable where expenditures had been made for the benefit of the trust estate and the trust estate had not paid for them, directly or indirectly. The trust estate, the court said, is either indebted to the trustee or would have been if the trustee had paid for the supplies or would be if he should pay the demand. As the trustee was a non-resident and insolvent so that the creditor could not recover his demand from him and would be compelled to follow him to a foreign jurisdiction, the trust estate, the court held, could be reached directly by a proceeding in chancery. The court said:

"A creditor seeking the aid of our courts should not be dismissed

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[21]It should be remembered that the statute then in force providing for suits to set aside fraudulent conveyances required judgment and nulla bona return.

[22]54 Miss. 79 (1876).

[23]*Id.* at 86.

[24]54 Miss. 467 (1877).

> because he might pursue a person to a foreign land, and there have a recovery against him. If he cannot obtain justice through our courts except by departing in an exceptional case from a rule of policy, to secure justice the departure should be made."[25]

The position taken by the Mississippi court in the *Norton* case is in line with the statement of Chief Justice Marshall in *Russell v. Clark*[26] that "if a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law."

We have attempted to outline the more important early Mississippi decisions on the matter with which we are here concerned as a prologue to a discussion of the one decision which has set up what is submitted to be the rule today.

Dollman v. Moore

The Mississippi Supreme Court decided *Dollman v. Moore*[27] in 1892. Action was instituted by Moore in a chancery court against Dollman, a non-resident, and the board of school trustees of Yazoo City, Mississippi, seeking to subject to Moore's demand certain funds alleged to be owed by the trustees to Dollman. The prayer was to the effect that the board of trustees be directed to pay the complainant out of the fund in its hands due to Dollman the amount he owed the complainant. Dollman appealed from a decree granting the relief sought. The ground for appeal with which we are concerned was that the proceeding was a statutory attachment in chancery, and that the demand sought to be subjected was not within the terms of the statute.[28] The court agreed with this contention on the theory that a municipal corporation (the school board being but a creature of the municipality) was not a "person" within the meaning of the statute.[29]

However, the author of the court's opinion, Justice Cooper, in an excellently reasoned exposition on the general law of equity, upheld the

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[25]*Id.* at 472.

[26]11 U.S. (7 Cranch) 69 (1812), cited in Hamilton v. Mississippi College, 52 Miss. 65 (1876).

[27]70 Miss. 267, 12 So. 23, 19 L.R.A. 222 (1892).

[28]The statute, in similar form to the present statute, provided: "The said chancery courts shall have jurisdiction of attachment suits against any non-resident, absent, or absconding debtor who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent, or absconding debtor." MISS. CODE § 1832 (1880). For present statute, see MISS. CODE ANN. § 2729 (1942).

[29]See note 28 *supra*.

decree. It was pointed out that since *Zecharie v. Bowers*[30] all attachments in chancery against non-residents had been, "so far as we are advised, under the statute, and there has been no case in which it has been sought to uphold the jurisdiction of the court in this class of cases without reference to its provisions."[31] It would be well to quote from the *Dollman* opinion to see how *Zecharie v. Bowers* was dealt with and to present undistilled the solid reasoning behind the court's holding:

> "But we are not satisfied with the rule announced in *Zecharie v. Bowers*. We think the decision there should have been for the complainants. The general rule undoubtedly is that a court of equity will not lend its aid to enforce a legal demand until there has been a judgment at law, and in some cases, an execution thereunder, with a return of nulla bona. But the rule never was of universal application, and was limited by the reason upon which it rested. When the debtor died, or was beyond seas, the complainant could have relief in equity. The principles upon which the rule rested were that legal questions should be tried by courts of law, and that suitors should exhaust their legal remedies before resorting to courts of equity. But how can a creditor obtain a judgment at law upon which the jurisdiction of equity would rest against a non-resident debtor? He might, it is true, go to the jurisdiction of the debtor, and there sue and recover judgment, and have execution and nulla bona thereon; but such proceedings would advance him no step, for when a judgment at law is essential, it must be a domestic one. . . . In the absence, then, of a statutory remedy by attachment at law or in equity, it would be impossible to subject the estate of a non-resident to the payment of his debts.
>
> "It would be a surprising condition of affairs if a non-resident debtor owning property in this state to creditors resident here could never have been compelled to pay his debts by the courts of this state exercising their common law jurisdiction."[32]

The rule of *Dollman v. Moore* has been used several times by the Mississippi Supreme Court since that decision and has never been criticized. First reference was made to it in *Gordon v. Warfield*.[33] In that case a resident of the state attempted through a chancery court to secure

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309 Miss. (1 S. & M.) 584 (1844). The complainant sought to subject the lands of a non-resident to the payment of a debt. The bill was framed without reference to the statute affording the remedy of attachment in chancery, but relied on the general principles of equity. The High Court of Errors and Appeals upheld the chancellor's dismissal of the bill because, "by the recognized principles and rules of proceedings in the English chancery court, this case would be beyond the sphere of its jurisdiction."

3170 Miss. at 273, 12 So. at 24, 19 L.R.A. at 226.

32*Id.* at 273, 274, 12 So. at 24, 25, 19 L.R.A. at 226.

3374 Miss. 553, 21 So. 151 (1897).

a judgment for unliquidated damages against a non-resident for damage done to complainant's land by drainage from defendant's land caused by acts of defendant's agents. Complainant could not rely on statutory attachment in chancery because his damages were not liquidated,[34] but relied instead on the general principles of equity. The court, citing *Dollman v. Moore*, held that the chancery court had full jurisdiction in the premises to grant proper equitable relief.

The decisions in *Dollman v. Moore* and *Gordon v. Warfield* were reconsidered and distinguished in *Aldridge v. First Nat. Bank*,[35] in which Aldridge sought in chancery to secure damages for the defendant bank's failure to perform a contract to sell Aldridge certain lands located in Mississippi. The bill of complaint alleged that part of the lands included in the contract had already been sold by the bank and that specific performance would therefore not lie. Complainant sought an attachment against the lands still owned by the bank for damages allegedly suffered by the bank's failure to perform. The bank appeared and filed a motion to quash the writ of attachment under section 5242 of the Revised Statutes of the United States[36] and to dismiss the bill. From a decree sustaining the bank's motion Aldridge appealed, setting up that the bill should have been retained under the general equity jurisdiction conferred on the court by the Mississippi Constitution.[37]

The court, in answering complainant's contention negatively, pointed out that a court of law or equity acquires the right to proceed, upon the filing of a declaration or bill of complaint, "in one of two modes: first, as against the person of the defendant, by the service of process; or secondly, by a procedure against the property of the defendant, within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery, it must be substantially a proceeding in rem."[38] It was pointed out that the proceeding was not to enforce a right to, interest in, or lien on property but was to enforce a claim against the owner of property, "which of itself alone confers no right to, interest in, or lien on, the property."[39] The proceeding,

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[34]At the time of this decision statutory attachment in chancery could not be brought to recover unliquidated damages. Today, such an action may be brought. MISS. CODE ANN. § 2729 (1942).

[35]165 Miss. 1, 144 So. 469 (1932).

[36]"No attachment, injunction, or execution shall be issued against such association [a national bank] or its property before final judgment in any suit, action, or proceeding, in any state, county or municipality." See 12 U.S.C. § 91 (1945).

[37]"The chancery court shall have full jurisdiction in the following matters and cases, viz.: (a) All matters in equity; . . ." MISS. CONST. § 159.

[38]165 Miss. at 14, 144 So. at 470. The court was quoting from Boswell v. Otis, 50 U.S. (9 How.) 336, at 348 (1850).

[39]165 Miss. at 14, 144 So. at 470.

it was held, was not strictly one in rem—that is, against the property itself, irrespective of its owner—but was quasi in rem.[40]

The opinion went on to say that the jurisdiction of the court to inquire into and determine the defendant's asserted obligation to the complainant is dependent on its control over the property. Aldridge's contention was that no seizure of the property was necessary in equity to bring it within the control of the court; that the mere filing of the bill of complaint, followed by publication of summons for the owner, had the effect of bringing it within the control of the court, citing *Dollman v. Moore* and *Gordon v. Warfield*. The court distinguished the *Dollman* case on the ground that it was a proceeding to subject a debt due by a resident defendant to a non-resident defendant, and all of the parties were before the court in person. "The jurisdiction of the court, therefore, was complete."[41]

The court disposed of *Gordon v. Warfield* by saying that the record in that case was not clear as to whether there was a seizure of the land and that if the holding of the court in that case was that no seizure was necessary or that the filing of the bill of complaint brought the land within the control of the court then that decision was wrong, was contrary to all authority, and would not be followed.

The *Aldridge* case might be considered a stumbling block to a proceeding in chancery to enforce a creditor's rights under either of the two situations outlined at the beginning of this Article. It should be pointed out, however, that in the more than twenty-three years since it was decided it has only been cited once by the Supreme Court of Mississippi and that was in a case involving an almost identical situation.[42]

Some states have authorized by statute a proceeding to set aside a fraudulent conveyance by a non-resident debtor-grantor where the res conveyed is within the territorial jurisdiction of the court even though jurisdiction of the parties (the fraudulent grantor and grantee) has not been acquired as is necessary for an adjudication in personam.[43] The Mississippi statute dealing with fraudulent conveyances provides: "The creditor in such case shall have a lien upon the property described therein from the filing of his bill, except as against bona fide purchasers before the service of process upon the defendant in such bill."[44] It is therefore submitted that under this section the jurisdiction of the court over the res is established and the court may proceed to set aside the con-

[40]The court cited Pennoyer v. Neff, 95 U.S. 714 (1877).

[41]165 Miss. at 15, 144 So. at 470.

[42]First Nat. Bank v. Mississippi Cottonseed Products Co., 171 Miss. 282, 157 So. 349 (1934).

[43]37 C.J.S., *Fraudulent Conveyances* § 337 (b) (1943).

[44]Miss. Code Ann. § 1327 (1942).

veyance even though the defendant is a non-resident and is not served personally with process.

This apparently is the majority rule. The Colorado case of *Shuck v. Quackenbush*[45] discusses in detail this whole question. The facts were these: David McIninch was indebted to Shuck and others. He purchased a piece of land in Colorado and took title in his wife's name to defraud his creditors. They subsequently executed a conveyance of the property to Quackenbush, which conveyance was not placed on record for some seven months after delivery. In the meantime, between delivery and recordation of the deed to Quackenbush, Shuck instituted a suit in Colorado to subject David McIninch's equitable interest in the land to Shuck's claim. McIninch and his wife were both absconding and non-resident debtors and Shuck obtained only constructive service on them by publication. Shuck proved his indebtedness and the property was ordered sold to satisfy Shuck's claim and he purchased it at the sale. Shuck's deed from the sheriff was recorded two months before the Quackenbush deed. The instant suit was to quiet Shuck's title.

In defense, Quackenbush attacked the validity of the proceedings by Shuck against the McIninches. The Colorado court ruled in Shuck's favor, holding that the suit against the McIninches was a proceeding in rem and that the filing of a bill in chancery and service of process is one recognized method of procuring a lien on equitable assets of a defendant debtor, whether the debt is evidenced by a simple contract or by a judgment. It held that it was not necessary to the court's jurisdiction of the property to have a writ of attachment sued out and executed as it would be impossible to serve because the debtor was absconding.[46]

Conclusion

No attempt is here made to state positively any hard and fast rule regarding the problems set out at the beginning of this Article. We submit, however, that in Mississippi creditor *A*, in the first example, could, under the authority of *Dollman v. Moore*, maintain a creditor's bill to have an equitable execution against the equitable interest of debtor *B* in the land covered by the delinquent but unforeclosed deed of trust. We further submit that under the authority of section 1327 of the Code,[47] the creditor in the second problem could have the fraudulent conveyance of the non-resident debtor set aside and subject the property to his demand.

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[45]75 Colo. 592, 227 Pac. 1041, 38 A.L.R. 259 (1924).

[46]See Annot., 38 A.L.R. 269 (1925), in which *Dollman v. Moore* is cited in support of the rule of *Shuck v. Quackenbush*.

[47]MISS. CODE ANN. § 1327 (1942).

THE FEDERAL SYSTEM AT MID-CENTURY

*William P. Murphy**

I

"The question of the relation of the States to the federal government is the cardinal question of our constitutional system. At every turn of our national development we have been brought face to face with it, and no definition either of statesmen or of judges has ever quieted or decided it. It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question. The general lines of definition which were to run between the powers granted to Congress and the powers reserved to the States the makers of the Constitution were able to draw with their characteristic foresight and lucidity; but the subject-matter of the definition is constantly changing, for it is the life of the nation itself. Our activities change alike their scope and their character with every generation. The old measures of the Constitution are every day to be filled with new grain as the varying crop of circumstances comes to maturity. . . .

"Undoubtedly the powers of the federal government have grown, have even grown enormously, since the creation of the government; and they have grown for the most part without amendment of the Constitution. But they have grown in almost every instance by a process which must be regarded as perfectly normal and legitimate. The Constitution cannot be regarded as a mere legal document, to be read as a will or a contract would be. It must, of the necessity of the case, be a vehicle of life. As the life of the nation changes so must the interpretation of the document which contains it change, by a nice adjustment, determined, not by the original intention of those who drew the paper, but by the exigencies and the new aspects of life itself. . . ."[1]

The considered language of Woodrow Wilson just set forth, representing as it does the widely accepted and prevailing view of virtually all competent scholars and observers of our historical and constitutional development, has a peculiar relevance for the times in which we are now living. For the past twenty years America has been readjusting its institutional practices—political, economic and social—first to an increasingly industrialized and interdependent domestic economy, and second to an increasingly shrunken world in which the prospect of annihilation hovers over a power struggle between conflicting ideologies. One ob-

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[1]WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 173, 192 (1908).

vious manifestation of the process of readjustment has been the great expansion in the functions of government at all levels—national, state, and local. While there are many indications that this readjustment has now leveled off, at least for a period, the events of the past two decades have generated a widespread concern and interest in the matter of intergovernmental relations. This interest is reflected in several recent studies which seek to appraise and evaluate our federal system as it operates at mid-century. It is hoped that this Article, calling attention to and discussing these studies, will encourage thoughtful Mississippi lawyers who are desirous of examining the question with serious objectivity to read one or more of these studies in its entirety.

II

Federalism: Mature and Emergent[2]

One of the many conferences sponsored by Columbia University in connection with its 1954 bicentennial was on the subject of federalism. More than sixty distinguished political scientists, lawyers, economists and publishers met to discuss papers which had been prepared by some twenty of the group on various aspects of federalism. This volume brings together under one cover these twenty-two essays as revised in light of the group discussion.

The volume is divided into four parts, and easily one of the greatest merits of the work is the introductory essay to each part written by the editor, who is professor of public administration at Columbia and former president of the American Political Science Association. Part I deals with "Federalism: Its Nature and Role." One essay discusses federalism as a device whereby differing nationalities and communities can achieve a new unity and at the same time retain their own distinct existence, the importance of which is obvious in these days of nascent nationalism in the underdeveloped areas. Another paper explores the questions whether there is a value which inheres in federalism as such and whether there are goals which can be attained only through federalism. In the essay on the balances of federalism, Southerners will be interested in the discussion of "the most distinctive American contribution to political theory: John C. Calhoun's doctrine of the concurrent majority," of which it is said that "in somewhat modified form, it has become the guiding principle of our public life." And finally, there is an illuminating examination of the relationship between our political forms and the evolution of our economic system.

Part II, entitled "Basic Controls in a Maturing System," is concerned

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[2]Edited by Arthur W. Macmahon. Garden City: Doubleday and Co., 1955 Pp. 557. $7.50.

almost exclusively with the American system. The political safeguards of federalism which are found, first, in the role of the states in the composition and selection of the national government and second, in the party system, are the subject of separate essays, with the conclusion suggested in both that these political factors tend to prevent an accomplishment in fact of that degree of centralization of power which would be permissible under the Constitution. A related essay discusses the currently timely problem of the "deliberate and persistent refusal by a state to perform properly its obligations to a union of which it is a member" and the means of coercion whereby the supremacy of the federal government within its sphere may be maintained. The function of the courts and the law in the operation of the federal system is dealt with in two papers. One of these analyzes the role of the Supreme Court as the umpire of the federal system, and is recommended especially for those who cling to the notion that the best qualification for a Supreme Court justice is prior judicial experience in the decision of private law cases. The other discusses the relation between state and federal law and is by far the most compact and meaty summary survey which the writer has yet seen in a single article. The responsibilities of the legislative and executive branches in managing a federal system are the subject of the final two essays in this part. In one of these the role of Congress is emphasized by a study of federal-state relations in the regulation of labor relations, the conclusion being reached that in this area Congress has either failed to recognize or has refused to perform its function in an effective manner. The final essay emphasizes the responsibility of the President to consider the implications of the federal system in his conduct of foreign affairs, while at the same time it calmly but conclusively cuts the ground from under the Bricker amendment.

Part III, "Functional Channels of Relationship," first presents a series of illustrative studies of how federalism operates in practice in various functional fields, with separate essays on agricultural policy and administration, the management of land resources, the management of water resources, and the patterns of trade regulation. Then there is a study, based on the experience in Minnesota, of how federal and state officials cooperate in decision-making in the execution of federal-state programs. The concluding essay in this part examines the fiscal aspects of federalism.

Part IV is entitled "Supranational Union in Western Europe." Three essays examine the relevance of federalism to the problems of economic integration in Western Union, one being concerned especially with the Coal and Steel Community. The two final essays in the book examine the problems of a European Political Community in light of the theory and practice of federalism.

A reviewer of this book has stated that "perhaps not since the Federalist papers has so much insight, wisdom and breadth of perspective on the subject been compacted in a single volume."[3] No dissent is here offered from that opinion.

III

The Nation and the States, Rivals or Partners?[4]

When Congress in 1953 created the Commission on Intergovernmental Relations to study and report on the operation of the federal system, Professor William Anderson of the University of Minnesota was a natural choice for membership. Former president of the American Political Science Association, he has long been a specialist in the field of intergovernmental relations. His first task for the Commission was to prepare a "working paper" which would summarize the history and present status of national-state relations in the United States. This book is an outgrowth of that effort, and it can be said without any hesitancy whatever that for readers who are seeking a short, complete, sound and readable description of our federal system, it is undoubtedly in a class by itself. The treatment and style are subjective, and many of the personal convictions which Professor Anderson expresses will not be shared by all. His major theses and basic postulates, however, are quite consistent with our historical and constitutional development.

In Part I, "Surveying the Federal System," Professor Anderson discusses the contemporary climate of opinion and the opposing philosophies of the states' righters and the constitutional liberals, and then examines the operation of the federal system in several specific situations —the financing and construction of highways, the providing of public assistance to the needy, and other examples of the cooperative activity of federal, state and local governments in the performance of public functions.

Part II deals with "Constitutional Problems and Issues." In six chapters of easy-to-read and easy-to-understand language, Professor Anderson gives a masterful summary of our constitutional development as it relates to national-state relations. The deficiencies and inadequacies of the Articles of Confederation which prompted the creation of the Constitution are first examined. The words and intentions of the framers of the original Constitution are then discussed, and the comparison of what they wrought with what had existed before should dispel conclusively from anyone's mind the idea that the Constitution was intended to create a mere compact of "sovereign states." In separate chapters Pro-

[3]Mansfield, Book Review, 49 Am. Pol. Sci. Rev. 872 (1955).

[4]By William Anderson. Minneapolis: University of Minnesota Press, 1955. Pp. 263. $3.75.

fessor Anderson then discusses the acts and intentions of the later framers, from 1787 to the Civil War and since the Civil War. The Eleventh Amendment, adopted in 1795, he calls the "only clearly states rights amendment ever adopted," and the Fourteenth Amendment, adopted in 1868, is described as "perhaps the final and conclusive step, in the constitutional sense, in the progress of the United States toward national supremacy and nationhood." Another chapter is devoted to the doctrine of states' rights, and Professor Anderson concludes that this doctrine is a deviation from the main stream of our constitutional and historical development.

Part III is concerned with "Issues of Policy and Finance." In one chapter the author refutes the conceptual thinking which maintains that there is a fixed number of public functions with clearly established and mutually exclusive lists of what is national and what is state or local. In another chapter he discusses the tax sources which are available to the national and the state governments and the problem of overlapping taxes. Then the subject of grants-in-aid and centralization of government is examined in light of the dire and gloomy predictions of critics that the country is headed toward state socialism and the destruction of our form of government. Professor Anderson's conclusion is that "the critics have not made out a good case either that the sums going into federal aid are enticing the states into a loss of their self government, or that the centralization and big government the critics profess to fear are inherently bad or dangerous."

The chapter on the self-government of the states should be read by all those who give credence to the ceaseless charges that steady encroachments of the national government are sapping the states of their powers and vitality. And especially should those who currently damn the Supreme Court as the arch villain in the process reflect that in recent years the Court has vastly increased the powers of the states by an abandonment of its former restrictive utilization of the due process and contracts clauses of the Constitution to shackle state power; that the Court has recognized a wide area in which state regulation may impinge upon interstate commerce; and that the Court's attitude toward the taxing powers of the states has never been more liberal than it is today. The fact of the matter is, as Professor Anderson points out, that the states are stronger, have more power and are more active today than they have ever been. The main obstacles to effective and efficient state government seem to be, not interferences from the national government, but outmoded state constitutions and executive, legislative, judicial and administrative systems sadly in need of reorganization. Finally, there is a chapter on self-government at the local level which makes the point, all too often

overlooked, that the states have not adequately discharged their own function of preserving and promoting municipal self-government.

In Part IV, "Changing the System," Professor Anderson concludes that "no fundamental change is needed in the relations between the national and state governments: no weakening of the national government, no great shifting of functions, no important reallocation of revenues or of taxing power, no basic change in federal-aid programs or policies, no diminution of the autonomy of either the national or state governments." To the writer the most interesting part of this chapter was the list drawn up by Professor Anderson of "the great achievements in politics and government that have made the United States what it is today." Those who constantly malign the national government and glorify the states should read this list and consider whether it is the national government or the states which have made the greatest contribution to American progress.

This book is a primer on the American federal system, and it is a safe prediction that no better basic work on the subject will be written for a long time.

IV

Report of the Commission on Intergovernmental Relations[5]

As already noted, Congress in 1953 established the Commission on Intergovernmental Relations to conduct an intensive study of national-state-local relationships, described by the Commission as the "first official undertaking of its kind since the Constitutional Convention in 1787." The Commission consisted of twenty-five members, fifteen appointed by the President and five each by the President of the Senate and the Speaker of the House, and was assisted by advisory and study committees which investigated particular subjects. The chairman of the Commission was Meyer Kestnbaum, president of Hart Schaffner & Marx. Most of the Commission members were practicing politicians, the appointees of the President, for example, including Governors Shivers and Thornton, and former governors Driscoll, Battle, and Jones. The advisory and study committees were dominated by business executives and government officials from all levels. Academic personnel were conspicuous only because of their paucity. These facts are mentioned by way of reassurance to those who, while extolling education in principle, are nevertheless suspicious if not contemptuous of professors. This study was made by "hard-headed, practical men of the world," and not by "eggheads" or theorizers "who never met a payroll or carried a precinct." By reason of

[5]A Report to the President for Transmittal to the Congress. Government Printing Office, 1955. Pp. 311. $1.25.

its composition, the Commission was not predisposed, then, to favor national aggrandizement at the expense of state authority.

It is remarkable, therefore, that the Commission's conclusions, as set forth in this final report, are not essentially different from those reached by the scholars whose works have just been reviewed. And it can be said further that the Commission's report gives little support to the charges and assertions of the states' righters. For the Commission realistically recognizes the growing pressure for national action which has resulted not only from war and economic crisis, but also from "intensified industrialization and population shifts from rural to urban areas; new advances in transportation and communications; and flowing from these developments, greatly accelerated mobility of people and interchange of ideas;" and also that "in our present highly interdependent society, there are few activities of government indeed in which there is not some degree of national interest, and in which the National Government is without constitutional authority to participate in some manner."

To indicate by way of summary the content of the Commission's report, it is divided into two parts. Part I is a general survey, consisting of five chapters the content of which is revealed by their titles: "Evolution of the American Federal System," "The Role of the States," "National Responsibilities and Cooperative Relations," "Financial Aspects of the American Federal System," and "Federal Grants-in-Aid." Part II consists of twelve chapters, each of which deals with a specific area of intergovernmental responsibility—agriculture, civil aviation, civil defense and urban vulnerability, education, employment security, highways, housing and urban renewal, natural disaster relief, natural resources and conservation, public health, vocational rehabilitation, and welfare.

Perhaps the one chapter in the report which could be most profitably read by Southerners is the one dealing with "The Role of the States." For this chapter sets forth many actualities which, if realized at all, are apparently forgotten in the midst of the unremitting denigration of the national government which is the stock in trade of many Southern politicians and publishers. The basic point made is that the success of our federal system depends in large measure upon the performance of the states. Theirs is the responsibility for all government below the national level, and theirs is the task of strengthening state and local government. Thomas Jefferson with his usual penetration observed that the only way in which the states can erect a barrier against the extension of national power into areas within their proper sphere is "to strengthen the State governments, and as this cannot be done by any change in the Federal Constitution . . . it must be done by the States themselves. . . ."

How well have the states lived up to their responsibilities? The Commission finds itself "confronted with the fact that many State constitutions restrict the scope, effectiveness, and adaptability of State and local action. These self-imposed constitutional limitations make it difficult for many States to perform all of the services their citizens require, and consequently have frequently been the underlying cause of State and municipal pleas for Federal assistance." State legislatures have declined in prestige and influence "primarily because they have not found effective solutions to problems that become more chronic and more difficult to cope with in a rapidly changing society."

One of the outstanding failures of the states is to maintain an equitable system of representation. This state neglect of reapportionment has led urban communities more and more to bypass the states and look to Washington and to make direct arrangements with the national government in such fields as housing, urban development, and airports. Legislatures are ineffective for such further reasons as limitations on frequency and length of sessions, low pay of legislators, inadequate physical and staff facilities, and restrictions such as the earmarking of tax revenues for special purposes. Although the successful operation of a government based on the separation of powers depends on provision for adequate executive authority, few states today have an adequate executive branch headed by a governor who can be held generally accountable for executing and administering the laws of the state. Typically the governor is only the nominal head of departments, commissions and agencies, the operating heads of which are elected or otherwise appointed so as to be independent of the governor's control. Few governors have the modern staff agencies and tools of management necessary to the administrative responsibility presumed to be vested in them. So far as municipal and county governments are concerned, the states have not adequately recognized or discharged their duty of strengthening local self-rule but have been guilty in respect to municipal governments of the same practices and attitudes by which they claim the states have been victimized by the national government.

It is clear that one of the reasons for the expansion of national action in this century has been the failure of the states themselves to discharge their own functions. In this connection, the Commission calls attention to the prescient warning uttered fifty years ago by Elihu Root, which is well worth repeating:

> "It is useless for the advocates of states' rights to inveigh against the supremacy of the constitutional laws of the United States or against the extension of national authority in the fields of necessary control where the states themselves fail in the perform-

> ance of their duty. The instinct for self-government among the people of the United States is too strong to permit them long to respect anyone's right to exercise a power which he fails to exercise. The governmental control which they deem just and necessary they will have. It may be that such control would better be exercised in particular instances by the governments of the states, but the people will have the control they need, either from the states or from the national government; and if the states fail to furnish it in due measure sooner or later constructions of the constitution will be found to vest the power where it will be exercised—in the national government."

On the basis of its overall study, the Commission makes the following recommendation: "Leave to private initiative all the functions that citizens can perform privately; use the level of government closest to the community for all public functions it can handle; utilize cooperative intergovernmental arrangements where appropriate to attain economical performance and popular approval; reserve National action for residual participation where State and local governments are not fully adequate, and for the continuing responsibilities that only the National Government can undertake." Of course, the point of disagreement will always be whether any particular function can be performed privately, locally, or by the states, or whether it is one that requires national action, and the statement is therefore about as helpful in the solution of any specific policy problem as the Tenth Amendment is with respect to power problems. It may nevertheless be of some value as indicating the lowest common denominator to which disparate views can be reduced and thus reconciled.

The Commission's report will undoubtedly be a basic reference work for federal and state administrators, as well as in law and political science courses, for some time to come.

V

Report on the Administrative and Fiscal Impact of Federal Grants-in-aid[6]

In addition to its overall summary Report to the President, the Commission on Intergovernmental Relations issued fifteen other publications. (All of the Commission's publications are listed in an appendix to its Report to the President and all are available from the Government Printing Office.) Ten of these were study committee or staff reports on the topics listed in Part II of the main report, one was a report on pay-

[6]The Commission on Intergovernmental Relations. Government Printing Office, 1955. Pp. 120. $.40.

ments in lieu of taxes and shared revenues, one was a report on local government, and three dealt with various aspects of the federal grant-in-aid programs.

One of the latter three is of especial interest to Mississippians. In carrying out its work, the Commission engaged a number of private management consulting and research organizations to conduct special surveys in seven widely separated states which varied in size, wealth, and population. These organizations collected information relating to the administrative and fiscal impact of federal grants-in-aid in the states of Connecticut, Kansas, Michigan, Mississippi, South Carolina, Washington, and Wyoming. Since these survey reports could not be published in their entirety due to their length, the Commission summarized the findings and recommendations in the report here discussed. The investigation and report on Mississippi were made in 1954 by McKinsey & Company, management consultants in Washington, and it is an illuminating and revealing study. Most of what follows is taken virtually verbatim from the Commission's summary.

Federal grants-in-aid to all states in 1930 totaled about $100 million, whereas today they total somewhere around $3 billion. In 1930 Mississippi received about $1.5 million annually from federal grants; today federal aid to Mississippi totals around $40 million, close to one-fourth of the state's revenues. Mississippi participates in all but one of the federal grant programs, twenty-two in all, which the Commission identified for study.

As to the impact of the grants on state administration, the report made the following findings, in light of the fact that Mississippi does not have the administrative controls which would result from a strong executive budget, a state-wide civil service system, a centralized purchasing system, a centralized planning agency, and similar devices. Federal agencies' requirements for submittal of state plans have stimulated constructive foresight and planning of the state's affairs in those areas where federal grants are available. Federal agencies' requirements for submittal of budgets complement state plans and constructively force state agencies to appraise accomplishments and to forecast financial requirements. Federal requirements as to compliance with technical and administrative standards have served principally to raise the quality of governmental services. Federal personnel requirements have insured the provision of qualified personnel and minimized political influences. Federal requirements as to reporting, auditing, and inspection are not regarded as onerous by state officials, and are in fact regarded as helpful in that they provide comparable information on developments in other states. There is substantial evidence to indicate that the state highway,

welfare, health, hospital and education agencies have been materially aided by the advice of specialists on the federal agency staffs.

As to the impact of the grants on the state fiscal structure, the report notes that Mississippi's government is in good financial condition, with an annual excess of receipts over disbursements, a substantial surplus, and a minimum of state debt. Taxes claim a larger share of the per capita income than in other states and are at rates as high or higher than in other states; nevertheless, the state has not provided for its residents schools, welfare, health and other governmental services equal to those provided by other states. The federal grants totaling $40 million, coupled with the high taxes, have still not sufficed to raise the level of governmental services so that it approximates that obtaining in other states. This means that Mississippi needs every dollar it gets from taxes plus every dollar it gets from federal aid to maintain a standard of governmental service which is still lower than that found in other states.

As to the impact of the grants on political institutions, one result has been the transfer of some authority from state to federal officials or, at the least, the habituation of state officials to consulting with and being guided by federal officials. Only one official of the state, however, cited an instance in which federal officials had exercised authority over a determination that, in his opinion, should have been reserved for decision by state officials. Although by and large local governments in Mississippi have retained a vitality and an influence over both local and state governmental affairs that is not paralleled in most urban states, there is evidence that the administration of federal grants has accelerated the centralization of governmental authority in the state government, particularly in the fields of welfare and employment security. The administration of federal grants has strengthened a relatively weak state government in Mississippi, where the electorate has never centralized strong executive power in the governor. The provision of federal grants has made possible increased public services which a predominantly agricultural electorate would not have established on its own initiative. These public services are substantially accepted as the proper province of government.

This study of the impact of grants-in-aid in Mississippi suggests that the "national interest" in a state as relatively poor as Mississippi may comprehend almost the whole gamut of state governmental services now aided by federal grants. If the residents of Mississippi are to move to other states in increasing numbers, their health, education, and welfare as well as the health of the state's economy can logically be determined to be matters of national concern. The "general welfare" to be promoted by federal grants-in-aid, Mississippi's experience suggests, involves the

stimulation of a poor and backward state to provide governmental services its residents would not or could not establish on their own initiative and to stimulate or to force the persistent raising of the standards under which such services are provided. Federal influence, as well as financial support, will be required, if the standards of well-being for residents of states confronted with economic and racial problems presented in extreme form in Mississippi are to be raised to minimum levels.

"Mississippi's experience suggests that Federal grants and their administration must be evaluated in terms of the economic and social realities of the Federal union as it is today. 'States' rights,' we were told in effect by a prominent Mississippi official and former legislator, 'is a shibboleth.' Our studies in Mississippi lend substantial support to this view. Mississippi is increasingly becoming an integral part of the population and the economy of the United States. People, healthy or ill, educated or uneducated, as well as commerce, flow across State boundaries. Mississippi may have once been a self-sufficient relatively isolated agricultural State. In 1954, it is rapidly becoming industrialized and more dependent for capital and markets on other States to which also flows a major part of the profit derived from its industries."

VI

Considering the several works just reviewed, the following is offered as a synthesis. As the Commission report notes, "experience amply justifies the view that our federal system, with the degree of flexibility that it permits, can be adapted to crises of the present and future as successfully as it has been to those of the past. As an instrument of positive government, it possesses—at least for a nation as large and diverse as ours—a clear advantage over a strongly centralized government. In helping to bolster the principle of consent; in facilitating wide participation in government; in furnishing training grounds for leaders; in maintaining the habit of local initiative; in providing laboratories for research and experimentation in the art of government; in fostering competition among lower levels of government; in serving as outlets for local grievances and for political aspirations—in all these and many other ways, the existence of many relatively independent and responsible governments strengthens rather than weakens our capacity for government. On the whole, therefore, the enduring values of our federal system fully warrant every effort to preserve and strengthen its essence."

But, as one of the Columbia essays points out, "obviously it is difficult to make a federal system work satisfactorily. It requires a high degree of political skill and sophistication, not only among the professional politicians but also throughout the whole body of citizenry. Most of all it demands a great deal of forbearance and mutual trust among all

its component groups. These are relatively rare qualities; and any federal system will have to operate under apparent handicaps so long as men are selfish, mistrustful, [and] impatient. . . ."

As to questions of power and policy, the Commission's observations are pertinent. "It is important that National powers be adequate to all truly national needs; it is also important that they do not jeopardize the proper functioning of the States. The former object is a matter of power and hence of constitutional law; the latter is primarily a matter of policy. . . . The National Government now has within its reach authority well beyond what it requires for ordinary use; forbearance in the exercise of this authority is essential if the federal balance is to be maintained. Yet prudent limitation of National responsibilities is not likely by itself to prevent overcentralization. A realistic program of decentralization in our contemporary society depends too on the readiness and ability of the States and their subdivisions to assume their full share of the total task of government."

By what standards, then, shall it be determined whether power should be exercised in any particular case? Professor Anderson offers an answer. "The tests that I would apply to every proposal are these: Will the proposed change almost certainly bring an actual increase in the strength and effectiveness of the governmental system as a whole in the meeting of foreign and domestic needs and emergencies? Is it a change that will insure higher standards of public service, or one that will bring the risk of lowered standards? Is it a change that will increase the loyalty and support of the people, or one that may bring popular dissatisfaction and disgruntlement? Is it one that will strengthen popular support of the American economic and political system, or one that may give arguments and weapons into the hands of the Communists and other subversive groups? These are severe tests to apply, but I think not too severe. I for one am not willing to gamble on some proposed change in the mere hope that it *may* bring *some* improvement. I want to see substantial and pertinent evidence and to hear persuasive argument that there is an actual evil to be corrected; that the proposed remedy is one that will clearly tend to correct this evil; and that no undesirable consequences are likely to follow from the change. I will be more impressed by actual historical evidence and experience than by wish and theory."

This Article opened with a quotation from Woodrow Wilson, so perhaps it would be best to close it the same way. In the work previously cited is found this language, which also has a peculiar relevance for our own time:

> "The object of our federal system is to bring the understandings of constitutional government home to the people of every part

of the nation, to make them part of their consciousness as they go about their daily tasks. If we cannot successfully effect its adjustments by the nice local adaptations of our older practice, we have failed as constitutional statesmen."[7]

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[7]WILSON, *op. cit. supra* note 1, at 197.

ESTATE PLANNING IN MISSISSIPPI

*Warren V. Ludlam, Jr.**

This Article consists of some observations made in the course of handling estate planning and probate work in Mississippi for several years past.

For one thing, too little attention is being given not only by owners but also by their lawyers to the making of plans for the disposition of estates in Mississippi upon the death of the owners. This is generally referred to as "Estate Planning." Countless estates, both large and small, are passed, for which there has been no pre-death planning. That estate owners in Mississsippi more often die without a will than with a will is shown by the fact that in Hinds County last year, the number of administrations of intestate estates far exceeded the number of administrations of testate estates.

Primarily, intestacy is the fault of the estate owner. He devotes all his time and thoughts to accumulating an estate but fails to perceive the need for or does not want to spend the time or the money necessary for careful arrangement of its disposition, so as to make sure it will do the most good for his family when he can no longer guide its use. (He does such unbusinesslike things as letting a reasonable trustee's fee stand in the way of the creation of a much needed trust, even when it is clearly demonstrated to him that the trust would save in taxes many times the trustee's fee.) Rarely does intestacy result in as beneficial use of the estate as could have been planned through a will with professional help. But intestacy is also chargeable to the estate owner's lawyer. Every lawyer should urge his established clients to make wills.

The making of a will, however, frequently is not enough, unless the will has been thoughtfully prepared. Today, because of heavy federal and Mississippi estate taxes and the complex methods of effecting estate tax savings, the simple wills of past years fail to do the job. The preparation of adequate wills, trusts and other dispositive instruments, of course, is the responsibility of the family lawyer and today he can meet this responsibility only if he has some knowledge of federal and Mississippi income, estate and gift taxes, or if he is willing (which he usually is not) to consult with a lawyer who does have this knowledge. Incidentally, it frequently happens that the family lawyer, in preparing the estate

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owner's papers, relies, without the client's knowledge, for his tax advice upon a life insurance agent or a trust officer, rather than another lawyer. This is not only short of being wholly fair with one's client—for he is relying on his lawyer to advise him not only on the law of trusts and estates but also on the law of taxes, or to suggest employment of a competent consultant on taxes—but it is also extremely dangerous, for with only a few exceptions, neither insurance agents nor trust officers have the training or the experience to qualify them to give such advice.

To correct this problem, all lawyers in Mississippi need to acquaint themselves at least in a general way with the tax phases of estate planning, in order to be in a position to do a more effective job in advising their clients and in planning their estates, and in recognizing when a competent consultant should be sought on tax problems of the estate. It is not necessary that the family lawyer be a tax specialist, but no lawyer today can serve his clients adequately and consistently in estate planning work unless he has knowledge of Mississippi and federal tax laws sufficient to enable him at least to recognize the tax problems involved.

The lack of this general knowledge on the part of many lawyers causes one of the greatest nightmares that life insurance underwriters, trust officers, and accountants in Mississippi have. They, more than the legal profession, are keenly aware of the tax problems, and frequently they are the first to see that an estate owner badly needs estate planning work done. They advise the estate owner to consult his lawyer. But this family lawyer, though skilled in trial, probate and other legal practice, has not bothered to familiarize himself, even generally, with taxation laws. He draws a simple, one-page will for the estate owner, by which he leaves everything to his wife, or does something else similarly disastrous and expensive tax-wise, and the result is that the estate owner might as well not have tried to do anything about planning his estate. Thereafter, neither the life insurance man, the trust officer, nor the accountant wants to advise an estate owner to go to another lawyer. Nor would they, in the first place, want to suggest that he go to another lawyer, though they knew that the family lawyer was probably not prepared to do the job. I know that this is a dilemma constantly faced by life insurance agents, trust officers and accountants, for scarcely a week goes by that I do not hear them talking about it. They vividly see the need for a general awareness in the legal profession in Mississippi of tax problems in estate planning, and this was one of the several reasons for the organization of the Estate Planning Council of Mississippi, a statewide organization of attorneys, life insurance underwriters, trust officers and accountants, which has a two-fold purpose: (a) continuing education of its members in estate planning work and the current changes in laws, such as tax laws, affecting estate planning; and (b) fostering of better

cooperation among the four groups in estate planning. This need is also one of the things which brought about the organization of the annual Estate Planning Conference at the University of Mississippi. Many lawyers belong to the Estate Planning Council of Mississippi, but there are many others who do not belong and who could benefit from membership in it. They could also derive benefit from the annual Estate Planning Conference at the University of Mississippi, but here again there are many Mississippi lawyers who do not attend.

In the preceding paragraph, I stated that it is often disastrous and expensive, tax-wise, for the husband to leave all of his estate outright to his wife, and vice versa, despite the fact that this seems to be the favorite solution of most Mississippi lawyers to the estate problems of their clients, even those with estates ranging up to $200,000. A typical situation where this type of will is undesirable from a tax standpoint follows:

> *H* (husband) has an adjusted gross estate of $150,000 and *W* (wife) has a separate estate of $75,000. Each executes a will leaving all of his or her property to the other spouse and *W* dies first. At the present rates there will be no federal estate tax on *W*'s estate due to the $60,000 specific exemption[1] and the marital deduction.[2] The state tax will be only $200, because of the $50,000 specific exemption.[3] But on the death of *H* with an adjusted gross estate of $225,000 and no marital deduction (assuming he does not remarry) there will be a federal tax of $40,200 and a state tax of $3,000. A tax credit[4] of $1,800 will be allowed against the federal tax leaving a total state and federal tax of $41,400.
>
> On the other hand, if *H* died first, with an adjusted gross estate of $150,000, there would be a federal estate tax of $1,050 and a state estate tax of $1,200, making a total estate tax of $2,250. But when *W* dies with an estate of nearly $225,000, the tax would be nearly the $41,500 as shown above, making a total of $43,650 on both estates.
>
> If, on the other hand, wills are drawn up to keep *W*'s estate from going into *H*'s estate should she die first (for instance, if the property is left in trust to pay the income to the surviving spouse for life with the remainder to the children), then if *W* predeceased *H* leaving an estate of $75,000, her estate would be subject to a federal tax of $1,050 and a state tax of $200, but on the death of *H* with an estate of only $150,000 (instead of $225,000) his federal estate tax would be $17,900 and his state estate tax $1,200 with a credit of $400

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[1] INT. REV. CODE OF 1954, § 2052.
[2] *Id.* § 2056.
[3] MISS. CODE ANN. § 9268 (1942).
[4] INT. REV. CODE OF 1954, § 2011.

against the federal tax or a total of $18,700, instead of $41,400.

If *H* died first with an estate of $150,000, left half to *W* and half in trust to pay the income to *W* for life with the remainder to their children, his tax would be $1,050 federal and $1,200 state, making a total tax of $2,250. Then when *W* dies with an estate of $150,000, her tax will be $17,900 federal and $1,200 state with a credit of $400 against the federal tax, or a total of $18,700. Both estates would be taxed a total of $20,900, instead of $43,650, which would have been the tax had *H* and *W*'s wills left everything outright to each other.

It can thus be seen that tax planning, if properly done, can save thousands of dollars for clients in the long run. The larger the estate involved the greater the savings achieved through effective tax planning, but even on relatively small estates many problems can be avoided by estate tax planning.

The above is my major observation on estate planning in Mississippi. Other observations follow.

Sometimes a husband or wife dies with no will and a small estate which passes to the surviving spouse and the children of the decedent.[5] If the children are minors this can mean long administrations, guardianships, court costs, bond premiums and attorneys fees which could to a large extent have been avoided had the decedent died testate.

In Mississippi most estate planning takes the character of writing wills. This is a step forward but estate planning should be much broader. The estate planner should consider lifetime transfers as well as wills. Trusts and gifts can be used to reduce both income and estate taxes. Short term trusts, as well as other types of trusts, can be used much more to advantage. Under the internal revenue laws,[6] the income of a trust set up for a period of over ten years, if the trust meets certain requirements of the internal revenue laws, will be taxed to the trust or its beneficiaries rather than to the grantor of the trust. This can be especially beneficial if the grantor or settlor of the trust is in a high income tax bracket and the beneficiaries are not. At the present time very little use is made in Mississippi of the insurance trust; yet this can be a very effective way of providing ready cash that will be needed at the testator's death. Often tax savings can be effected by passing property under the gift tax rather than the estate tax.

It would be very helpful in estate planning in Mississippi if the so called "pour-over" trust could be used. At the present time under the Statute of Wills this method of estate planning is probably invalid in

[5]MISS. CODE ANN. §§ 468, 470, 472 (1942).
[6]INT. REV. CODE OF 1954, § 673.

Mississippi. This plan involves an inter vivos trust which is drafted along the lines that the settlor wants his property to go at his death. Sometimes, for example, the trust is set up giving the grantor the income for life and further providing how the corpus shall go at death. When such an inter vivos trust is used to embody the desires of the settlor or grantor, it is easy to prepare a will that will carry out the intention of the testator. The will then sets out the specific bequests and the remainder of the estate is left to the inter vivos trust. This plan would involve incorporating by reference into a will a trust not executed in accordance with the Statute of Wills. Such a trust is often revocable or subject to amendment by the donor. Under the present law in Mississippi, it is probable that for such incorporation by reference to be used the trust would have to be irrevocable and would already have to be in existence when the will was executed. There are so many dangers involved in incorporating a trust into a will by reference that at the present time if an estate owner wants his testamentary estate to go the same way as a trust set up by him, it is better to set up in the will the same general provisions that he has in the trust, though this results in extensive repetition.

Another difficulty in Mississippi is the fact that we have different Rules Against Perpetuities for real and personal property. Estate planning could be made much easier if we had the same Rule Against Perpetuities for both. For instance, if a man dies with an estate consisting only of personal property, he may leave the property in trust to pay the income to his children for life and then to his grandchildren—whether or not they were living at the time of his death—until they reach 21 at which time the principal and interest will be distributed. On the other hand, if a testator wants to leave real property, since there is a doubt whether the Rule Against Perpetuities will allow real property to be tied up for longer than lives in being, he must generally either convert the property to personal property or leave it to his children for life with remainder to his grandchildren on the death of his last child or else leave the property in trust only during the lives of grandchildren living at the time of his death. To hold the property without distribution until all of his grandchildren reach 21 could violate the Rule as to real property, although some authorities say it does not. This uncertainty in the Rule Against Perpetuities necessitates distribution to minors if the property is to go to grandchildren. It would greatly simplify the problem of estate planning in Mississippi if we had the same Rule Against Perpetuities for real and for personal property.

Gifts to minors have now become standard procedure in estate planning. A trust is usually set up with the minor as beneficiary with a power of appointment. For this reason, it is desirable that the bene-

ficiary be allowed to make a will. At this point the question arises whether or not it would be desirable to lower the age for making a will from twenty-one to perhaps eighteen. Often where a trust is set up, the fund must be distributed to the minor or to the minor's appointees. A child cannot exercise a power of appointment until he is twenty-one, and if in the meantime he dies without being legally adopted, the trust estate could go to the natural parents rather than to the persons who have set up the trust for the child.

Trusts, both testamentary and inter vivos, play an important part in estate planning. Often these trusts can be most effectively administered by trust companies experienced in this field. Sometimes stocks and bonds constitute the major part of an estate but unless the trust instrument specifically provides for the registration of securities in the name of a nominee, the trust company cannot take advantage of this procedure. Further, if a trust company desires to execute a proxy it is usually necessary first to obtain a court order. The removal of these two difficulties would simplify trust administration and enable trusts to operate more effectively in Mississippi.

In conclusion, let me say that there has been no attempt to point out all or even most of the problems that arise in estate planning in Mississippi. Rather, the intention of this discussion is to point out only a few of the factors to be kept in mind and to make attorneys, as well as others, aware of what can be accomplished through effective estate planning.

EDITOR'S NOTE: For a comprehensive treatment of all problems of estate planning, see Casner, *Estate Planning—Cases, Statutes, Text and Materials* (Little, Brown & Company, 1953, with 1955 supplement). For excellent short treatments of estate planning, see Bowe, *Tax Planning for Estates* (Vanderbilt University Press, 1955), Trachtman, *Estate Planning* (Practising Law Institute, 1955), and Tweed and Parsons, *Lifetime and Testamentary Estate Planning* (American Law Institute, fifth edition, 1955). Chapters dealing with estate planning are contained in the following recent books: Warren and Surrey, *Federal Estate and Gift Taxation—Cases and Materials,* chapter XV (Foundation Press, 1956); Lasser, *Estate Tax Techniques,* chapters I-VI (Matthew Bender & Company, 1955). Among recent law review articles on estate planning, the most outstanding are Casner, "The Internal Revenue Code of 1954: Estate Planning," 68 *Harvard Law Review* 222-256 (1954), and Casner, "The Internal Revenue Code of 1954: Estate Planning II," 68 *Harvard Law Review* 433-487 (1955). The monthly *Trusts and Estates* (Fiduciary Publishers, Inc., New York) devotes considerable space to estate planning problems.

WORDS FOR LAWYERS

*Judge George W. Hardy, Jr.**

On the title page of a compilation of lectures on the study of words by Dr. Trench, then Dean of Westminster, there is this quotation:

> "Language is the armory of the human mind, and at once contains the trophies of its past, and the weapons of its future, conquests."

If it lay within my power to make one, and only one, recommendation to students of the law, I believe I would suggest that they diligently devote themselves to the unceasing study of the meaning and use of words. To me it seems most strange that lawyers should permit themselves to become slovenly, careless, inexact and thoughtless in their use of words which are the very tools of their trade, the instruments designed for the practice of their profession. We would be most skeptical of a craftsman who chose to use a rough bit of sandstone instead of a power driven lathe, or a surgeon who preferred to perform a delicate operation with a meat cleaver instead of a scalpel. Yet we lawyers all too frequently resort to the use of the crude bludgeons of awkward expressions and clumsy words in the attempt to portray and transmit our arguments. This fault is not confined to any particular category susceptible of being distinguished by age, experience or education, but, unfortunately, it seems in some degree to permeate all groups.

It may be that judges appear to be somewhat demanding and perhaps overly meticulous with respect to their criticisms of arguments, both oral and written, but let me assure you that they are more than justified. It is neither my desire nor purpose to enter into an academic discussion of any of the branches of the science of philology, but I do propose to illustrate my point by reference to a few examples.

More and more it is noted that lawyers are falling into the inexcusable habit of using the entirely meaningless phrase that "such a thing is different *than* such and such a thing," a phrase which seems to have been adopted, for no reason, by numerous writers and speakers as a substitute for the correct, meaningful and appropriate "different *from*." In the field of domestic relations the use of "*martial* domicile," "*martial* obligations" and similar phrases has become so widespread that we no longer consider the usage exclusively the result of typographical errors. The employment of "*substantuate*" for "*substantiate*" in both the spoken and written language is more or less commonplace. A recent brief submitted to our court strenuously belabored the question of the "*fudiciary*" rela-

*Presiding Judge, Second Circuit Court of Appeal, State of Louisiana.

tionship of an agent to his principal. In my experience, the epitome of ineptness and ambiguity was exemplified in the brief of an able lawyer who somewhat casually commented that the opposite party to the litigation was given to "lying down between customers." I assure you that this intriguing observation had no relevancy whatsoever to the case in hand. Of the same pattern was the observation of counsel in a recent brief that the defendant had procured a separation from "bed and *bored.*" This may have been more truth than error.

Seemingly unimportant mistakes sometimes have far reaching results. The employment of the word *"casual"* for *"causal"* has become so commonplace that it is scarcely worthy of comment, and the error is so obvious and unimportant that, ordinarily, it should be permitted to pass unnoticed. Nevertheless, a young lawyer before this court some months ago, in oral argument, repetitively and emphatically urged the existence of a *"casual"* connection between a compensation claimant's disability and an accidental injury sustained in the course and scope of his employment. In such manner our errors are sometimes impressed upon the mind by their very repetition, to the lasting damage of proper and exact terminology.

The above illustration also serves as the basis for a brief discussion of a rather delicate problem in professional relations. Under such a circumstance as that above related what is the obligation, if any, of the court? Should a judge, from the bench, take the opportunity of correcting counsel, or should he simply dismiss such an incident as unworthy of attention? Let me assure you that this dilemma not infrequently occupies at least the passing consideration and attention of courts. As a rule we let such mistakes pass uncorrected for fear of causing embarrassment to counsel, but there is some question whether this forbearance, in the long run, proves to be the kinder and more helpful attitude.

As it is with the written, so with the spoken word. The effect of many an oral argument is substantially impaired by careless delivery, slovenly enunciation, and improper pronunciation. Consider as examples, out of innumerable instances, the effect of the sounds of *"govmint," "edjucation"* and *"mizzerble."* Even as the most minute flaw in an otherwise perfect gem materially lessens, if it does not actually destroy, its value, so the impact of these faults in writing and speaking detracts from what may be otherwise a most logical and convincing presentation.

These and countless other similar expressions and words sometimes may be excused on the grounds of carelessness or ignorance, but never can they be justified, and invariably they detract from that need for exactness which we have the right to expect from those who are engaged in the study, the practice and the administration of law.

As a people we are prone to an exaggerated carelessness in speech and thought. Our tongues are so glib, our speech so verbose, that perhaps in much talking we lose something of the fundamental purpose of our language. Observe us, hear us, from day to day, as we mouth of our devotion to freedom and justice, as we insist upon the recognition of what we so facilely call our rights, our liberties, our privileges, more often than not, in the process, confusing right with desire, liberty with license, and privilege with personal preference.

Perhaps I may emphasize my point by attempting to define my own conception of the primary purpose which should be the paramount concern of every lawyer in his preparation of a brief or his presentation of oral argument to judge or jury. And it may be of assistance to you in attempting to clarify your purpose in your own mind.

What objective has a lawyer in mind when he writes a brief or delivers an oral argument? Obviously the answer is that his purpose is to convince the judge or jury of the correctness of his factual and legal conclusions. But how does he attempt to achieve this end? It seems to me that what a lawyer seeks to do is to paint a picture, and the only distinction between the lawyer and the artist is that the lawyer must use words rather than colors and his artistry must depend upon the exact shading and the meaning of words rather than upon the manipulation of brushes and the compounding of colors.

In other words, the fundamental purpose of language, whether written or spoken, is the transmission of ideas. In the legal profession the purpose, almost without exception, of the transmission of an idea is to establish a conviction in the mind of the transferee. If this be so, then unquestionably we should be diligent and devoted in our attempt to execute as perfect, as true, as exact a delineation as may be possible through the use of words.

There are a few simple rules which may be of benefit, particularly to the student lawyer, and these I would invoke in the following order of importance:

1. Strive for simplicity, directness and, above all, sincerity in speaking and writing.

2. Avoid over-reaching.

3. Conform your presentation to the intellectual level of your hearers.

These suggestions are simple and self-explanatory. I would only elaborate upon the last by saying that it is more dangerous to talk down to your hearers—to patronize them—than it is to err on the other extreme.

No doubt it will interest you to know that judges look upon lawyers

not only as officers of the court but as trusted assistants who have it within their power to give us invaluable aid in our efforts to reach just conclusions. In order to provide maximum assistance to the court it is therefore highly desirable that a lawyer's presentation be expressed with both precision and grace. In many instances uncertainty of thought is betrayed by carelessness in speech. It is well to make every effort to avoid vague generalizations. Let your words, like bullets, be aimed at the target, not fired at random. We would adjure you to know the facts of each case, to relate those facts to the applicable law, and to present your logical conclusion, based upon this relationship, in language that is clear, exact, pertinent and appropriate.

In view of the general tenor of this Article it seems appropriate to take cognizance of what is sometimes designated as the spirit and feeling of anti-intellectualism that appears to pervade our current social consciousness. This observation needs little, if any, amplification, for we are all familiar with what appears to be a current tendency to look with suspicion upon those who seem to be above the average standard in both general knowledge and specialized learning. Let us be assured in our very souls that this is but a transient phase through which we pass, a phase which, indubitably, will dissipate itself. The vast majority of our people will still choose the services of doctors who are more skilled than the average medical practitioner; they will seek the spiritual advice of ministers and priests and rabbis more learned in theology, more experienced in spiritual needs than the norm; they will entrust their business and financial interests to the hands of those most expert and most experienced in such matters; and, eventually, they will insist that the affairs of government be administered by those who have mastered both its science and its application. Yes, and a lawyer's most humble client has the right to expect him to bring to bear upon a modest claim every resource of his training and education. It may be temporarily true, as Mr. Stevenson has aptly observed, "Via ovicipitum dura est," but surely the goal is worthy of persevering effort.

In conclusion, permit me to observe that you have my permission to peruse this dissertation with tongue in cheek, knowing or at least surmising that the author is guilty of many of the errors against which he would warn you. Let me assure you that judges do not expect perfection, particularly from themselves. In reading the published report of one of my recent opinions—unfortunately, our mistakes are perpetuated in print—I find the following observation:

". . . defendant perforce admits the fact *to be true.*"

Why, oh why, did I use those "three little words?"

Mea culpa!

MEDICAL EVIDENCE AND MEDICAL WITNESSES†

*Truman B. Rucker**

The preparation of medical evidence and the presentation and cross-examination of medical witnesses are subjects of great interest to every trial lawyer. Seven out of every ten lawsuits that are tried contain medical evidence. A lawyer's ability to prepare medical evidence and to present and cross-examine medical witnesses is an important factor in determining his success in those seven cases.

Recently I heard a prominent plaintiff's lawyer remark, while lecturing to his associates, that lawyers must read medical books in order to acquire enough medical knowledge not only to prepare their evidence, but to examine and cross-examine medical experts. Not long afterwards, while attending a meeting of insurance lawyers I heard a prominent insurance lawyer tell other lawyers and claims adjustors that they must learn to read x-rays. He had completely overlooked the fact that about fifty percent of the doctors who are required to interpret x-rays send them to a roentgenologist.

The average lawyer does not have the background to dig into the medical books and secure enough information to properly handle the medical phases of a case, nor does he have the training to read x-rays. But necessity demands that he do something to acquire some knowledge of the handling of medical evidence. I suggest that he read the various medical texts and medical magazines that are published for the benefit of practicing lawyers and also attend the various institutes in which both doctors and lawyers participate. Although there are other medical-legal institutes, undoubtedly the best known is the Law-Science Institute conducted by Dr. Hubert Winston Smith of the University of Texas.

Another suggestion is to do as my firm has done, and that is, make arrangements with a retired doctor to help solve medical problems. The average practicing doctor today is too busy to talk to lawyers about lawsuits, let alone do any research for them. But if arrangements can be made to have a retired doctor handle medical research, he probably will be glad to have something to occupy his time and, of course, could find more answers in one day than a legal staff could find in one month.

Such a doctor can also help you in choosing your medical witnesses. This is always a serious problem. Often, when you are representing an injured man, he is being treated by a general practitioner. If you are going to take his case into court, you want him examined by a specialist.

†From an address given at the Tenth Annual Mississippi Law Institute, Jackson, Mississippi, December 2, 1955.

*Rucker, Tabor & Cox, Attorneys at Law, Tulsa, Oklahoma.

Sometimes it is not too easy to convince a general practitioner that you will need additional help in court from a specialist whose qualifications are such that they will carry considerable weight with a judge and jury. Finally, you have to pick a doctor with whom the attending physician is friendly and for whom he has respect.

Your medical adviser should produce medical literature for you to use in court that the jury can understand. The use of books in court is most convincing. A witness can testify to a fact, but if it is written down, the jury is more apt to believe it.

An examination of Mississippi law has revealed that the first and possibly the only reported Mississippi case with reference to the use of medical books is *Tucker v. Donald*.[1] That case held that medical books may not be introduced to prove a fact, but it indicated that they could be used on cross-examination, which, of course, is generally the rule.

I think most of us have found when we read a newspaper article concerning a situation with which we are familiar, that it was not reported with a perfect degree of accuracy. Nevertheless, most people believe what they read. So, if you are able to read an excerpt from a medical book to a jury, that should make an impression far greater than the testimony of any medical witness. A few excerpts from medical books will illustrate my point.

Dr. Henry A. Davidson, one of our country's leading psychiatrists, in his work, *Forensic Psychiatry*, states on page sixty-four:

> "In any event, there seems to be general agreement that we ought not to use the label 'traumatic neurosis' for superficial emotional disturbances following an accident, but that we ought rather to limit it to basic conflicts in which the trauma simply pulled the trigger. It corresponds essentially to 'latent psychoneurosis precipitated by the accident.' "

Thus, a plaintiff who received an alleged neurosis following an accident probably was not normal before the accident. His attorney should readily admit that fact, then prove that his client was able to handle all of the conflicts and problems of life up until the moment of this accident, which pulled the trigger. All you have to prove is an aggravation or precipitation of the latent, prior existing disease.

Let's see what the defendant can use from the same page in Dr. Davidson's book. In the very next paragraph, this prominent psychiatrist says:

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[1] 60 Miss. 460 (1882).

> "The essential feature of a compensation neurosis, is that the syndrome is 'created in part by a subjective conviction on the part of a patient that he has been in a compensative accident. The disorder is precipitated by environmental factors. One of the factors is the prospect of indemnification. This can be simply paraphrased: 'The desire for cash compensation may be the major, though usually unconscious, force in keeping the symptoms alive.' "

And in the very next paragraph is a clincher:

> "The term 'traumatic neurosis' should be reserved for a conventional psycho-neurosis lighted up by the accident. In an article of mine written in the American Journal of Medical Jurisprudence in 1939, I suggested that the traumatic neurosis was an effort to resolve the conflict between the desire for adventure and the desire for security."

The average plaintiff's lawyer who is trying a case based on traumatic neurosis won't hit the issue squarely. He will start talking about physicial injury and you can beat him on that phase. The plaintiff may be suffering just as acutely from his neurosis as he would be suffering from a true physical ailment, but he will not be adequately compensated for it if his attorney does not present it properly.

An excellent paragraph that can be used in defending against a neurosis case is found on page 460 of *The Neuroses* by Walter C. Alvarez, formerly of the Mayo Clinic and the University of Minnesota:

> "An excellent paper on the traumatic neuroses is by Morehead, who has had a big experience in this field. He commented on the fact that traumatic neuroses rarely followed severe injuries. They come more often after minor injuries and in many cases are the result of suggestion, fear, anxiety or desire for revenge or financial gain. They develop often from unwise suggestions or actions of internes, doctors, nurses, physiotherapists, lawyers or others. . . . Recovery usually occurs only after the desire for remuneration has been satisfied. Several men with huge experiences in this field have said that no one with traumatic neurosis ever recovers while a suit is pending."

One of the fine medical books which can be used when representing the plaintiff is *Attorneys' Textbook of Medicine* by Dr. Gray, medical director of Aetna Insurance Company. On cross-examination, you can look at the defense lawyer and ask, in such a way that the jury will conclude that he is representing Aetna, "Mr. Jones, you, of course, wouldn't

question a book written by the Medical Director for Aetna Casualty & Surety Company?" Even if your inflection does not suggest to the jury that it is Aetna that defense counsel is really representing in the case, at least you will convince the jury that medical directors for the Aetna Insurance Company would write only a book which is most conservative. The same question can be asked the doctor that you are about to cross-examine with this book.

I once represented a plaintiff who was an uneducated fellow, and only shortly before trial did he complain about the headaches and dizzy spells from which he was suffering. He had been rendered unconscious by the accident and had undoubtedly suffered much pain thereafter. But he was not a man who complained a great deal and had said very little to his doctor and almost nothing to his lawyer about these complaints. He had been examined by the insurance doctor, who testified that he could find nothing wrong with him. The doctor testified that the man had made no complaints to him of headaches and dizzy spells. I inquired, "Well, Doctor, did you ask him?" The doctor said, "No, I didn't ask him every little thing that might be wrong with him. I told him to tell me his complaints." I then asked the doctor how many years he had spent in grade school and how many in high school and how many in college, how many in medical school, and how many in internship. The doctor admitted he had spent nearly twenty-five years in training. Then I asked the doctor, "Here is a fellow who never got past the fourth grade. You spent twenty-five years in learning to make a diagnosis. Don't you think that when you are talking to a fellow with such limited education you ought to get a complete history and not depend on him to make the diagnosis for you?"

A careful search of medical literature reveals that post-traumatic epilepsy can occur at any time following serious brain injury. In an article written by Aldrich in 1904 it is said:

> "Yet from our knowledge of the irritating effects which may arise from injury to any portion of the brain, we are prepared to believe that cerebral injury wherever located, may, in after years, result in epilepsy."[2]

Elvidge, in his book, *The Post Traumatic Convulsive and Allied States* (found in Brock, *Injuries of the Brain and Spinal Cord and Their Coverings*, 3d ed.) says:

> "An epileptic seizure may occur at any time interval after a head injury."

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[2]Aldrich, *Fracture of the Base of the Skull as a Cause of Epilepsy*, 84 B. MED. NEWS 980 (1904).

It can be seen that the use of medical books not only is enlightening to counsel in the preparation of his case, but, of course, is most helpful in the courtroom.

I suggest that you ask a doctor to assist you in finding the applicable medical books, and particularly ones that the jury will understand. It is of little benefit to read some lengthy paragraph to the jury if they don't understand what it means. Daniel Webster said that clarity of statement is the greatest asset of an advocate. It is particularly important to be clear when presenting medical evidence, because you are dealing with something that is highly technical. What the doctor says is not helpful to an attorney's case unless the jury understands it. One of the classic examples of how not to try a case was demonstrated in a New York forum. The testimony involved a ruptured intervertebral disc. Here is a portion of the examination of a doctor by one of the lawyers:

Q. Is there such a thing as a hypertrophy of the ligamentum flavum?

A. Sometimes in association with disc herniations the ligamentum flavum at certain levels might be thicker than at other levels.

Q. In other words, it is a thickening of this ligament?

A. It is always associated with a disc herniation.

Q. Isn't it a fact that the symptoms of hypertrophy of the ligamentum flavum are identical with the diagnosis of herniation of the nucleus pulposus? Is the symptomatology the same in a hypertrophy of the ligamentum flavum as in a nucleus pulposus?

A. I do not attribute any symptomatology to the hypertrophy of the ligamentum flavum but only to the disc herniation.

Most jurors are not smart enough to understand that. The doctor must be cautioned that he should talk so the jury can understand him.

One of the ways of simplifying medical testimony for a jury is to use demonstrative evidence. That, of course, can be overdone. I have seen entire skeletons used in court, but never successfully. The defense lawyer can make fun of the skeleton and call him "Old Eddie," or something else. However, parts of skeletons can be used and often to great advantage. I once represented a client who had a fracture of the astragalus bone. By using the skeleton of the leg and foot, I was able to illustrate the injury. I do not like the use of such a technical word as "astragalus" so in my examination of the doctor, I said I couldn't pro-

nounce the word. And I asked if he would mind calling it the ankle joint bone, if that was what it was. He agreed to do so.

Nearly all attorneys are using positives of x-rays now. Unless the x-ray shows rather clearly a fracture or a compression or something of that character, it may be unwise to use it but where it does show, then you can either have a large x-ray turned into a positive, or you can have several smaller ones made for the jury.

Another thing to remember is to introduce your doctor to the jury. Unless you happen to be in a small community where the jurors all know the doctor, let the jurors know something about this medical witness. You should show what school he graduated from, what kind of training he had, what he did later, and what the extent of his practice has been. Frequently, when you place a doctor on the witness stand, the lawyer on the other side will admit his qualifications. Still, you should spend two or three minutes showing to the jury that your doctor is an outstanding man.

Not only should you throughly qualify your own medical witness but you should also disqualify your opponent's doctor by your cross-examination. I am one of the few lawyers in the United States who believes that you ought to cross-examine medical witnesses. The reason for the other view is that the first book a young trial lawyer reads is *The Art of Cross-Examination* by Wellman. After reading that, the young trial lawyer thinks he is an expert cross-examiner. As a result, every time a witness takes the stand and testifies to a simple fact, the young lawyer ties into him with all the vim and vigor taught in this book, and consequently gets his brains batted out. Then, as the years go by and he gets older, he comes to the conclusion that he has cross-examined too much. So-called experts tell us not to cross-examine and the next thing we know, we don't cross-examine any witnesses. This is a serious mistake.

Of course, cross-examining an expert is harder than cross-examining a lay witness, and particularly if they get you into their field. *You should get them out of their field and into your field.* When a doctor testifies to a state of facts that hurts you, you should, in some way or another, try to discredit either the doctor or his testimony. That doesn't mean get off into a scientific argument and let him discredit you.

There is a psychiatrist in Oklahoma who has testified and will willingly testify that he is thoroughly convinced that seventy percent of the people need or will need psychiatric treatment during their life and that ten percent either should be or during their lifetime will be confined in a mental institution. In my cross-examination of him, I ask him about

these convictions and then in the argument, I say, "Ladies and Gentlemen of the Jury, there are twelve of you so about eight of you need psychiatric treatment and one of you belongs in a mental institution according to the doctor." I know that may sound a little ridiculous but then I continue to argue, "Maybe he's the one that's a little off base."

In one case in which I represented the defendant, a psychiatrist who had treated the plaintiff, a lady, testified that all he had ever done was talk to her and give her a few vitamin B-1 shots. Her bill was about $1,500 for this treatment. Before the argument, I purchased an enormous bottle of B-1 pills for four dollars and argued to the jury if she had gone to Sears Roebuck, she could have purchased the same thing for four dollars instead of $1,500.

A Texas psychiatrist once testified that one manifestation of abnormality following an accident was a poor memory, and mentioned that the plaintiff could not remember capitals of states. The defense attorney kept hammering on the fact that the plaintiff couldn't remember the capitals of states. Finally, he asked the doctor, "What is the capital of Nevada?" He had to admit that he didn't know and the clever lawyer, by this examination, got the doctor out of the medical world and into his own world.

In another case in which I represented the plaintiff, I cross-examined the defendant's doctor who had testified that the plaintiff had a "minimal narrowing of the fifth cervical vertebrae due either to trauma or degeneration." I cross-examined as follows:

Q. What does "trauma" mean?

A. Accident.

Q. What does "degenerative" mean?

A. It means "diseased."

Q. If pain followed the accident, then it would indicate trauma?

A. Yes.

Q. If a man has a compression of the fifth cervical vertebrae, then in my language, that means a broken neck?

A. Yes.

Q. Then what the fellow had was a slight broken neck?

The doctor grinned and said he assumed that was true.

The preparation of medical evidence, the presentation of medical witnesses, and the cross-examination of medical witnesses, are most difficult problems, but they are ones which we must solve if we are going to succeed as trial lawyers.

PREPARATION FOR TRIAL†

*Thomas B. Hill, Jr.**

If there is any one truism upon which all successful trial lawyers are in thorough and complete accord, it is this: A law suit well prepared is already more than half won. A lawyer starts either to win or lose a law suit from the moment of his first interview with his client, and the probability of ultimate success increases or diminishes in direct proportion to the thoroughness of his preparation of the case from the time it comes into his office until the final verdict of the twelve good men and true is announced. Mr. Francis X. Busch of the Chicago Bar, who is in my opinion one of the truly great trial lawyers that this country has produced, in his outstanding work, *Law and Tactics in Jury Trials*, has this to say about preparation of the case:

> "Preparation is the sine qua non of successful advocacy. Adequate preparation comprehends a complete familiarity with all of the facts discoverable by intelligent and persistent investigation, and a knowledge, or a source of knowledge readily at hand, of every question of law likely to arise during the trial.
>
> "There is no novelty in this suggestion. It has been the theme of successful trial lawyers from the time of Cicero; of law writers since the days of Coke. Courts have emphasized it; in Storm v. United States,[1] the Supreme Court declared: 'Litigants ought to prepare their cases for trial before the jury is empanelled and sworn.'
>
> "Advocacy alone, however brilliant, cannot supply deficiencies in preparation. A skillfully and persuasively presented case, an effective cross-examination, or a really great argument, on retrospective examination will usually be found to have been the result of carefully laid preparation rather than the product of extemporaneous acquisition."[2]

How can thorough and complete preparation of a case for trial be fully achieved? There is one elementary yet fundamental principle that should be foremost in the mind of every trial lawyer in the preparation of his case for trial, and that is that the primary objective of any litigation is to ascertain the truth of the case to the end that justice will be done. If we proceed on any other theory, if we have as our objective the winning of the case at all hazards, irrespective of the truth or justice of

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†From an address given at the Tenth Annual Mississippi Law Institute, Jackson, Mississippi, December 2, 1955.

*Hill, Hill, Stovall & Carter, Attorneys at Law, Montgomery, Alabama.

[1]94 U.S. 76 (1876).

[2]Busch, Law and Tactics in Jury Trials § 200 (1950).

the case, if we are willing to prostitute truth and justice for the sake of winning the case, then we are unworthy of membership in our great profession. So, as my first suggestion, I would recommend that you convince yourself that truth and justice are on your side, and then you may with good grace and conscience exert all the power and strength of Hercules, the eloquence of Demosthenes, the wisdom of Solomon, the patience of Job, and the gall of a CIO organizer to convince the court and jury of the righteousness of your cause.

Let us consider a few cardinal rules and suggestions which, if followed, will, I believe, produce most pleasing percentages in the "won and lost" column and, in the end, happier and more generously minded clients.

Marshal and Thoroughly Digest the Facts of the Case

The first step in any law suit is the initial interview between attorney and client. The prospective party litigant who has been grievously wronged and who desires redress, or who is being unjustly sued and wishes protection at your hands, comes into your office to secure your services. In the average case, such party is a layman, an ordinary citizen without legal training, who knows only one thing of which he is *sure* and that is that *he is absolutely right in his position.* You are the instrumentality chosen by him and upon which he relies for vindication. If you are successful, you are a very capable, intelligent and estimable gentleman; if you are not successful, well, we just won't go into what you may be called under those circumstances. Let's try to achieve the first category.

You are now interviewing your client, your principal witness. Listen carefully to the story that he relates. Many lawyers feel it necessary to take down completely and almost verbatim the story as it comes from the client. That story as told by the client usually contains much that is entirely irrelevant and of no value to the case. It frequently omits much that is germane and highly important, the value or significance of which the client is wholly unable to perceive. After he has completed his story, go over it with him again and subject him to a searching cross-examination. Caution him to be entirely frank and honest with you; explain to him that if he does not give you all the facts, those that may be unfavorable as well as those that may be helpful, you will be taken by surprise and placed at a great disadvantage on the trial when those harmful facts are brought out by the opposition. You will be astounded at some of the valuable information which you will develop, and by learning of the unfavorable evidence you will be in a position to procure in advance of the trial such refuting evidence as may be available, or, if

none is available, then to treat it in such way as to minimize its injurious effect.

Often it is advisable when there are unfavorable facts which are bound to come out in the trial to beat your adversary to the draw by proving such facts yourself, the natural result or effect on the minds of the jury being that they must not be too damaging because you proved them yourself. Frequently, such action on your part will impress the jury with your frankness and sincerity, thereby creating a very wholesome impression on the jury; and you thereby will build up in their minds a confidence in you which might not otherwise exist.

So it is essential that you learn all the facts, favorable and unfavorable, from your client and from any other available source, to the end that you may intelligently plan the strategy of the trial and determine the most effective way of gaining the greatest benefit from the favorable facts and sustaining the least injury from the unfavorable. There is another advantage of a searching cross-examination of your client. You have therein a preview of his demeanor on the witness stand, thereby affording you the opportunity of sizing him up, determining whether he is timid and reticent, or garrulous; you are then in a position to prepare your examination on the trial to meet his particular characteristics. And, by your preliminary examination of him you give him a sample of what he may expect when he gets on the witness stand. If it doesn't frighten him out of the notion of litigating the case, he at least can fortify himself for the ordeal.

Interview and Secure Statements From Witnesses

You have now obtained all the facts possible from your client, and he mentions that there are other witnesses who are conversant with some of the facts of the case. If it is an automobile accident case you will have requested a copy of the report of the officers who investigated the accident, and obtained therefrom a list of all the witnesses known to them. It is essential that you contact and interview the witnesses as quickly as possible. There are many obvious reasons for this: (1) The closer the examination of the witness is to the occurrence, the fresher is the witness's memory and the more distinct his recollection of vital details. (2) His early examination has the effect of indelibly fixing his testimony in his mind so that delay in the trial of the case will not erase the details from his memory. (3) It is highly desirable that you be the first to interview the witness, that is, before your adversary contacts him. Psychologists will tell you, and I have seen it demonstrated in my personal experience, that a witness is naturally sympathetic with the first party who interviews him after an incident or occurrence. While the witness may be entirely honest and conscientious, the first one who con-

tacts him and discusses the matter with him has a great advantage over his adversary who delays his interview.

I recommend the taking of a detailed statement in writing from each witness concerning his entire knowledge of the case. It is not practical to ask the witness to write such a statement in his own handwriting. If the witness cannot come to your office, where his statement can be taken down by your secretary, write it out, as nearly as possible in the language of the witness, and then have him read it over and ask him to sign it. Some lawyers, in taking a written statement, in cases where it is anticipated the witness may try to repudiate the statement, make it a practice to make one or more intentional mistakes, either in spelling or otherwise, on each page of a statement; and, when the witness reads the statement and discovers the mistake, he is asked to correct it, which he does in his own handwriting. If he subsequently repudiates the statement at the trial, the correction of the error in his own handwriting is a powerful corroborating circumstance in establishing the accuracy of the statement. The advantage of the written statement is very obvious. It refreshes the recollection of a friendly and honest witness, and holds the dishonest or wavering witness in line.

Visit the Scene

Let us assume now that we have interviewed and secured written statements from all witnesses known to us. The case involves an automobile collision at a busy street intersection. The next step, which in my opinion is equally as important as the preceding ones, is to visit the scene. If you are to conduct an examination of a witness to an occurrence such as an automobile collision, you are laboring under a tremendous handicap if you are not fully and completely familiar with the scene of the occurrence, the angles and widths of the intersecting streets, the presence or absence of traffic control signals and devices, the location of buildings or structures on the four corners, the presence or absence of blind intersections, distances from the intersection that drivers of vehicles could see other vehicles approaching on intersecting streets, and a great wealth of other details which only visual inspection of the scene will disclose.

It is highly advisable, if within the realm of possibility, to visit the scene with each witness separately, and by all means with the client, and go over the testimony of each in great detail at the scene before the trial. Have the witness point out the spot or place where he was located at the time of the collision or occurrence, thereby disclosing the opportunity that the witness had to view the incident. Not only does this impress the facts upon the mind of the witness, but it enables the attorney to coordinate his thoughts with the testimony of the witness and thereby, with a visual picture of the scene, conduct the examination of his witnesses

and the cross-examination of adverse witnesses in such a way that under his questioning the witnesses will so describe the situation to the jury that the jury too will see it.

I cannot impress upon you too emphatically the advantage to be derived from careful, painstaking, thorough, persistent and detailed discussion with your client and each of the witnesses of the facts which they respectively know about the case. Let me warn you against one pitfall which entraps many lawyers with catastrophic results. Never, never put any witness on the stand with whom you have not discussed his testimony. Even if you have a signed statement from the witness taken by someone other than yourself, don't put him on unless and until you have yourself learned from him in a personal conference just what his testimony will be. I can assure you that if you do, you will regret it. You should know with reasonable certainty what the witness's answers will be to every question that conceivably could be asked him, either on direct or cross-examination. You should be as familiar with his version of the facts, his testimony, as he himself is, and this applies to friendly witnesses as well as to adversary witnesses. Many times are lawyers made to look ridiculous and foolish to the court or jury, and sometimes with fatal results to their case, by an unfortunate question directed to a witness which would not have been asked had the lawyer adequately prepared himself and familiarized himself with the testimony of that witness. And, another thought—never ask an adverse witness why he said or did a certain thing. This gives him the opportunity to make a speech against you, and sometimes can be disastrous.

Use of Photographs, Maps or Drawings and Other Demonstrative Evidence

Photographs and drawings or maps of scenes of accidents, or instrumentalities involved, are frequently very helpful in the trial of a case. But there is one warning which I would impress upon you. If the photographs or drawings will clearly reveal concrete evidence favorable to your case, as for example structures obstructing the view of an intersection where the collision occurred, then produce them. But if you are not dead sure they will help your case, leave them off, for they may help your opponent. And another warning, equally as vital—if you are planning to use a photograph or map in connection with the examination of a friendly witness, go over it fully and in great detail with the witness before placing him on the stand. The average witness is not trained or experienced in the use of such photographs and particularly maps or drawings. If asked to point out his location at the time of the incident, or to indicate on the map or drawing the point of impact of two vehicles, or to identify other objects on the drawing or map which he has not seen

before, the witness will almost invariably become confused and indicate an erroneous location, and your embarrassed and fumbling attempts to correct his error will bring forth gleeful chuckles from your opponent.

Let us assume that you are representing a plaintiff in more or less humble circumstances, and that you have decided that a picture of his damaged car will be helpful in establishing the way in which the collision occurred. Suggest to him that he take the picture himself with his own small camera in the yard of his home, and with his humble abode in the background. By so doing, you will in a very subtle manner, but none the less emphatically, create in the subconscious minds of the jury a most favorable impression of a poor, honest home owner whose car has been battered and practically destroyed by the vehicle of your adversary whose insurance carrier, with unlimited resources at its command, has obtained from a commercial photographer elaborate and expensive pictures of the vehicles involved. The contrast will be very satisfying and generally remunerative.

In assembling and preparing your evidence in automobile accident cases (and I continue to make reference to this type of case because it is the most common and frequent type of litigation that we encounter in the courts these days), there is another kind of evidence to which you will wish to give consideration. I refer to the use of toy or model automobiles to demonstrate how a collision occurred. My recommendation is that if you have a case in which you want the jury to see exactly how it occurred, such as a case in which your client's car was hit in the side by the front end of your adversary's client's car, and the physical facts such as the damage to each car indicate that the accident could only have happened that way, effective use can be made of such toy automobiles by handing them to your adversary's client when he takes the witness stand and asking him, with a very innocent, inquisitive expression on your countenance, to show the jury just how he contends the collision occurred. But if you represent the party whose front end collided with the broadside of your adversary's client's car, and you are trying to muddy the water, forget about the toy automobiles and hope your adversary doesn't remember to use them either.

Claim Reasonable, Not Astronomic Ad Damnum in Personal Injury Actions

You have now interviewed all witnesses known to you and procured statements from them. You know the facts which you can reasonably expect to be able to prove. You are convinced from your knowledge of the pertinent principles of law that you can make out a prima facie case if your client is the plaintiff, or that you can make out a tenable defense if you are representing the defendant. So you prepare your pleading. It

is well to review the authorities before undertaking to prepare your complaint or your defensive pleading, so as to be sure to render your pleading demurrer-proof by alleging all necessary elements. If you are plaintiff, claim some reasonable ad damnum, not an astronomic figure. You will minimize the value of your claim by suing for an obviously disproportionate or excessive sum of money.

Contact Adverse Witnesses When Discovered

Your pleading is filed, and your case is at issue. The trial is approaching, and you subpoena your witnesses. Your opponent does likewise. Upon checking the subpoena docket, you find that he has issued subpoenaes for several witnesses who were not known to you. The question then arises: Should you contact those witnesses to ascertain what their testimony will be? Some lawyers have the impression that it is highly unethical and improper to contact your opponent's witnesses. This is entirely erroneous. Not only is it not unethical, but on the contrary it is your duty to contact every witness who may have any knowledge of the facts. After all, it is the truth that you are seeking, and you cannot be assured that you have the truth of the case if you have not contacted and interviewed every witness. Neither side has any possessory right or property interest in a witness or his testimony. Each side has the right and the duty to know what the testimony of every witness will be. If he is going to give evidence that is adverse or contrary to the facts as related by your witnesses, you should know it in advance and thereby have the opportunity to prepare to cross-examine him to disprove his version of the facts if they are inaccurate.

Frequently, you will contact an adverse witness who is uncooperative, if not openly hostile, and who refuses to discuss the case with you. By so doing, he is walking into a very dangerous trap, for if he testifies for the other side, you can weaken or destroy the force of his testimony by asking him such question as, "Why did you refuse to discuss the case with me when I called upon you?"; or, "If what you have testified to is the truth, why did you wish to conceal it and refuse to talk to me?" "Was it because of your friendship for the plaintiff (or defendant as the case may be)?"

Medical Testimony in Personal Injury Actions

If your case is a personal injury action, whether for the plaintiff or for the defendant, you must prepare your medical testimony. If you are representing the plaintiff, the burden naturally is upon you to prove clearly and to the satisfaction of the jury the nature and extent of the injuries suffered by the plaintiff. Ask the doctors who have treated your client to furnish you with a written statement describing the injuries,

the treatment administered and the probable period and degree of disability. Study it carefully. Procure and use one of the many standard treatises on legal medicine. And at least several days before the trial make an engagement with the doctor for a conference at his office. Explain to him that neither you nor any of the jurors are members of the medical profession nor acquainted with the meaning of technical medical terms, and that the story must be unfolded to the jury in clear and simple laymen's language that you and they can understand. Ask him to demonstrate any fractures or other demonstrable injuries with x-ray plates or other available facilities. The chances are, if you exercise tact and diplomacy, that he will conclude your interview by offering to prepare a set of questions for you to ask him, in order to bring out the nature and extent of the injuries in the most effective and understandable way. If you are representing the defendant in a personal injury action, and the plaintiff is claiming permanent personal injuries, you should by all means require an examination of the plaintiff by a disinterested specialist. Such an examination is provided for by Rule 35 of the Federal Rules of Civil Procedure and by the laws of most of the states. The examination will usually verify the existence of permanent injuries, if they exist, thereby enabling you to more accurately evaluate the case for settlement purposes, or reveal the false and fraudulent claims of the malingerer in such cases.

Use of Discovery Procedures

You have now interviewed all the witnesses except the adverse party, and you are not sure just what his contention will be. No one step is more vital in the proper preparation of a case for trial than a thorough and comprehensive oral examination under oath of the adverse party. Until recently in Alabama, a party could be examined only by written interrogatories propounded to him, which method is very unsatisfactory. There is too much opportunity for evasion and it is almost impossible to tie down or commit the adverse party by written interrogatories. The last legislature of Alabama, following the Federal Rules of Civil Procedure, adopted a statute providing for the oral examination of adverse parties and witnesses prior to the trial, for the purpose of discovery and for use at the trial, if desired.

Similar discovery measures are now authorized by the laws of most jurisdictions. The potentials of such oral examinations are tremendous. In the first place, the adverse party can be examined as a hostile witness by leading questions, and the examining party is not bound by such testimony. Thus, the issues can be fixed and determined in advance of the trial, and the adverse party can be committed on the vital issues in the case. The possibility of being taken by surprise at the trial is eliminated.

Utilizing such pre-trial discovery provisions, of course, may work both ways. With opposing counsel equally diligent, there may be no advantage to either side, for in most cases, when you examine his client, he is going to invoke the same privilege as to yours. However, it frequently happens that opposing counsel is not equally diligent, and these provisions are utilized only by the experienced advocate with whom the conscientious and meticulous preparation of every case has become an obsession.

Select and Determine Order of Presentation of Witnesses

You have now fully and completely marshaled and digested the facts. You have interviewed every witness whose identity you could obtain, and you know substantially what the testimony of each witness will be. Your next task is to separate the chaff from the wheat. Determine which witnesses will be helpful to you; if there is any doubt of the value to you of a witness, never use him. Many cases have been lost because counsel placed a witness on the stand whose testimony was of doubtful value, and who, on cross-examination by opposing counsel, inflicted the coup de grace to the case of him who put him initially on the stand. Remember that an answer given by *your witness,* either on direct or cross-examination, which is favorable to your opponent, is usually much more persuasive and carries much greater weight with the jury than that same answer would have been accorded had it been given by a witness called by your opponent. If a witness will testify to facts that are favorable to both sides, it is much preferable to pass him up, if he is not an indispensable witness to your case, and let him be placed on the witness stand by your opponent, and then, on cross-examination of him as your opponent's witness, bring out the facts favorable to your position.

When you have selected and listed the witnesses whom you will use, it is highly important that you determine before trial the order in which your witnesses will be called. They should be called in an order calculated to present the case, so far as possible, in its own natural and chronological sequence, building it up step by step to its logical conclusion. As Max Steuer, the great trial lawyer, once remarked: "Your case should unfold like a well written novel, chapter by chapter, not only sustaining but increasing interest until the climax."

We have in our office found it extremely helpful, and uniformly follow the practice of preparing with meticulous care the direct examination of our witnesses, in advance of trial. In this way we make sure that every favorable point and item of evidence will be covered, many of which would, without such memoranda at hand, probably be overlooked in the heat and tension of the trial. We take an ordinary legal pad and prepare our notes on the direct examination of each witness on

sheets in the chronological order in which we have determined to present them, and in this way we make sure that no evidence or witness is overlooked. Such memoranda can be readily prepared from the written statements in your possession; and, while the burden of preparing such memoranda may be seemingly onerous, I believe you will find that it will pay handsome dividends. We also prepare notes or an outline of proposed cross-examination of anticipated adverse witnesses, emphasizing such facts as our previous interview with them has revealed they will admit. A much more effective examination, both direct and cross, can be prepared in the peace and quiet of your office, before the trial gets underway, than you will be able to contrive in the hustle and bustle of the court room.

Preparation and Use of Trial Brief of Law

Many cases are more or less routine, run-of-the-mill. In such cases, unless there are some special legal intricacies, there is no need for a trial brief, as the pertinent legal principles are, more or less, common-place and of common knowledge. But in other cases, we frequently find numerous and intricate technical questions not commonly encountered, and it is in such instances highly important to have at hand a thoroughly complete memorandum of authorities supporting your position. If there are contrary cases in the books, they should also be cited with an analysis showing how and why they are distinguishable from the case at bar. Aside from the aid and assistance which such a trial memorandum affords the advocate in his argument on questions of law to the court, the trial attorney creates a most favorable impression upon the jury with most beneficial results if he is thoroughly prepared to promptly and effectively support his position or to meet objections of his opponent with sound and logical argument, amply fortified by pertinent authority.

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STUDENT COMMENTS

INCORPORATION OF TRUSTS INTO WILLS

The disposition of estates is frequently effected in whole or in part through the use of inter vivos trusts—either unamendable and irrevocable or amendable and revocable, but principally the latter—and testamentary trusts created by will. In perhaps the most common case, the settlor executes an inter vivos trust, reserving to himself the income for life and directing that thereafter the income and corpus be paid to designated beneficiaries. Unless the settlor is certain of the sufficiency of the remainder of his assets to satisfy his business needs or meet any adversities which may arise during his lifetime, it is unlikely that he will be willing to place the trust corpus irrevocably beyond his control; and unless he can be sure that he has selected the beneficiaries and the amount of each gift with unerring accuracy—which, of course, he cannot—he is likely to be reluctant to deny himself power to amend the trust. Therefore, he is likely to prefer a trust fully amendable and revocable. But whether or not the trust established is amendable or revocable, addition to it by testamentary trust created by the estate owner's will is an obvious and desirable method of completing his plan of estate disposition. If the provisions of the testamentary trust are set out in full in the will, without reference to or reliance on the provisions of the inter vivos trust, no concern need be given to the vagaries of the doctrines discussed herein. But if for various reasons which he or his estate advisor may consider to be of determinative importance,[1] it is desired merely to refer to the inter vivos trust and direct that the corpus of the testamentary trust be held "upon the same trusts and for the same purposes" as stated therein, the ultimate efficacy of his disposition will probably depend upon a particular court's understanding of and disposition toward two judicially constructed doctrines: (1) The doctrine of incorporation by reference, and; (2) the doctrine of acts of independent significance.

Discussion of these two doctrines as they have been applied to effectuate or destroy testamentary trusts sought to be established by reference in a will to inter vivos trusts is the primary purpose of this Comment. Problems involved in the integration of wills[2] and those arising from powers of appointment conferred by will are beyond its scope. Further, the discussion assumes the validity of an inter vivos trust over which the settlor has retained substantial control.[3]

Incorporation by Reference

Under the judicially constructed doctrine of incorporation by reference, a writing, although not itself executed in compliance with the applicable Statute of Wills, may be drawn into the "four corners" of a

[1]For discussions of the advantages of inter vivos trusts augmented by testamentary trusts created by will, see SHATTUCK, AN ESTATE PLANNER'S HANDBOOK §§ 11, 12, 13 (1948); Will, *Inter Vivos Transfers: Trusts and Powers of Appointments*, 1949 U. ILL. L. FORUM 47.

[2]For a concise statement of the differences between integration and incorporation by reference, see ATKINSON, WILLS §§ 139, 142 (1937); Evans, *Incorporation by Reference, Integration, and Non-testamentary Act*, 25 COLUM. L. REV. 877, at 888 (1925).

[3]See Comment, *Substituting a Trust for a Will*, 27 MISS. L.J. 57 (1955).

will if certain requisites are met. The will must (1) refer to and identify the writing with reasonable accuracy, (2) as a writing in existence at the time of the execution of the will, and (3) manifest the testator's intention to incorporate the writing therein and make it a part thereof. The writing must (1) be shown to have been in existence in fact at the time of execution of the will, (2) correspond to the description given in the will, and (3) be shown to be the writing referred to in the will. The absence of any requisite is considered fatal to incorporation by reference.[4] Substantially as stated the doctrine is recognized by judicial decision in England[5] and in the great majority of American jurisdictions.[6] In some states, it is recognized by statute.[7] Connecticut rejects the doctrine,[8] as, seemingly, does Louisiana.[9] New Jersey is undecided.[10] New York's position is, to a great extent, unascertainable.[11] Arkansas has recently erased a dictum[12] to the effect that it did not recognize the doctrine by

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4 1 PAGE, WILLS §§ 242, 243, 248-55 (2d ed. 1926); ATKINSON, WILLS §§ 142, 143 (1937).

5 Allen v. Maddock, 11 Moore P.C. 421, 14 Eng. Rep. 757 (1858), is the leading case in England. It should be noted that this decision was rendered after the enactment of the Wills Act, 7 WM. IV. & 1 VICT., c. 26, § 9 (1837), which provided that all wills "shall be signed at the foot or end thereof." Two decisions prior to the Wills Act, Molineux v. Molineux, 79 Eng. Rep. 126 (1605), and Habergham v. Vincent, 30 Eng. Rep. 595 (1793), had established the doctrine, and adherence to them in *Allen v. Maddock* illustrates the principle that the extraneous writing is incorporated, not after the "end" of the will, but at the point in the will where reference to it is made.

6 Newton v. Seaman's Friend Society, 130 Mass. 91 (1881), is the leading American case.

7 IND. ANN. STAT. § 6-601 (h) (Burns 1953); OHIO REV. CODE § 2107.05 (Page 1954). See Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381, 157 A.L.R. 1164 (1944). Although the doctrine has been rejected by Connecticut courts, Hatheway v. Smith, 79 Conn. 506, 65 Atl. 1058 (1907), see Conn. Laws 1953, c. 442, *infra* note 54.

8 See note 7 *supra*.

9 *Compare* Succession of Ledet, 170 La. 449, 128 So. 273 (1930), *with* Hessmer v. Edenborn, 196 La. 575, 199 So. 647 (1940), noted in 40 MICH. L. REV. 492 (1942).

10 Clark v. Citizens Nat'l Bank, 38 N.J. Super. 69, 118 A.2d 108 (1955); First Mechanics Nat. Bank v. Norris, 134 N.J. Eq. 229, 34 A.2d 746 (1943); Hackensack Trust Co. v. Hackensack Hospital Ass'n, 120 N.J. Eq. 14, 183 Atl. 723 (1936); Murray v. Lewis, 94 N.J. Eq. 681, 121 Atl. 525 (1923).

11 "It is unquestionably the law of this state that an unattested paper, which is of a testamentary nature, cannot be taken as part of the will, even though referred to by that instrument." Booth v. Baptist Church, 126 N.Y. 215, 28 N.E. 238, 242 (1891) (dictum). "The rule against incorporation has not been set aside," but "we are not to press the rule to a drily logical extreme." Cardozo, J., in In re Fowles' Will, 222 N.Y. 222, 118 N.E. 611, 613 (1918). "The rule against incorporation is not a doctrinaire demand for an unattainable perfection. It has it limits in the considerations of practical expediency that brought it into being." Cardozo, C. J., in In re Rausch's Will, 258 N.Y. 327, 333, 179 N.E. 755, 757 (1932). "It cannot be disputed that the decision of the Court of Appeals in *Matter of Rausch's Will* is an exception to the well-settled rule in this state against incorporation by reference. That case, however, must be limited to its own peculiar facts." President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232, 236 (2d Dep't 1940). Against this background, a New York lower court remarked in 1953: "[T]he . . . document sought to be incorporated meets the test to be applied . . . [if] . . . it is in existence at the time of the execution of the will, is clearly indentifiable, and *is of a variety which excludes the possibility of alteration, chicanery, fraud or mistake.*" In re Snyder's Will, 125 N.Y.S.2d 459, 463 (Sur. 1953). (Emphasis added.) The only clue given as to the "variety which excludes the possibility of alteration, chicanery, fraud or mistake" is the holding. See note 42 *infra*.

12 O'Leary v. Lane, 149 Ark. 393, 232 S.W. 432 (1921).

two decisions which unambiguously approve and apply it.[13] The remaining American jurisdictions either accept the doctrine or have not had an opportunity to choose. Mississippi, apparently, falls in this last category.[14]

There is no additional requirement that the writing be of any particular type, or that it possess any independent legal force. Nor is there any requirement that the writing be signed by the testator or any other person. Consequently, the extrinsic documents which have been presented to courts for incorporation are of diverse types. Among the more prevalent are: wills of another;[15] prior invalid wills—or, more precisely, papers in the form of a will—of the testator;[16] undelivered deeds;[17] contracts;[18] and, of course, trust instruments.

It is obvious that, to a degree, reading into a will the provisions of another unattested document does violence to the words, and perhaps the spirit, of the Statutes of Wills. One court in denying the doctrine observed that it militates against authentication of the entire will and renders possible the sort of fraud against which the Statutes of Frauds and Statutes of Wills are aimed.[19] But even if the *possibility* of fraud is enhanced, continued adherence to the doctrine certainly indicates that courts have not found or suspicioned an *actual* increase in fraud. Experience seems to have shown that requiring the document to be clearly identified and in existence at the time the will is executed sufficiently protects testators against fraud, and the rule is not likely to be abandoned so long as judges retain their desire to effectuate testamentary wishes.

Acts of Independent Significance

"Even though a disposition cannot be fully ascertained from the terms of the will or an incorporation therein, the gift may be valid if susceptible to identification by facts which have a significance independent of their effect upon the testamentary disposition. Then, the designation of the beneficiary or of the amount of the bequest may be governed by a past or future act of the testator, the beneficiary, or a third person, whether or not such act is embodied in or accompanied by a writing. But, if the reference is to an act which has meaning only in terms of the disposition under the will, this doctrine offers no aid."[20] This state-

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[13]Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51 (1950), noted in 6 ARK. L. REV. 496 (1952); Kinnear v. Langley, 209 Ark. 878, 192 S.W.2d 978 (1946).

[14]*But see* Hewes v. Hewes, 110 Miss. 826, 71 So. 4 (1916).

[15]Bemis v. Fletcher, 251 Mass. 178, 146 N.E. 277, 37 A.L.R. 1471 (1925); Clark v. Dennison, 283 Pa. 285, 129 Atl. 94 (1925).

[16]Allen v. Maddock, 11 Moore P.C. 421, 14 Eng. Rep. 757 (1858). The *incorporation* of a prior *invalid* will should be distinguished from the *revival* of a prior *valid*, though perhaps revoked, will. See ATKINSON, WILLS § 168 (1937); Samuels, *Incorporation by Reference in New York Wills,* 19 N.Y.U.L.Q. REV. 270 (1942).

[17]Re Dimmitt, 141 Neb. 413, 3 N.W.2d 752. 144 A.L.R. 704 (1942); Hogue's Estate 135 Pa. Super. 543, 6 A.2d 108 (1939).

[18]Allday v. Cage, 148 S.W. 838 (Tex. Civ. App. 1912).

[19]Hatheway v. Smith, 79 Conn. 506, 65 Atl. 1058 (1907).

[20]Samuels, *op. cit. supra* note 15 at 273, 274. For general discussions of acts of independent significance, see ATKINSON, WILLS § 144 (1937); 1 SCOTT, TRUSTS § 54.2 (1939); Evans, *op. cit. supra* note 2 at 891; Evans, *Non-testamentary Acts and Incorporation by Reference,* 16 U. CHI. L. REV. 635 (1949); Scott, *Trusts and the Statute of Wills,* 43 HARV. L. REV. 521, at 544 (1930).

ment defines, perhaps as particularly as is possible, a doctrine which, although referred to herein as "the doctrine of acts of independent significance," is given a particular name more often by commentators than by courts.[21] Whether a particular act will be found to have independent significance or to have "no pertinency except its effect upon the testamentary provisions"[22] is a question of fact, not of law,[23] and more comfort, or sorrow, will be found in analogous cases than in definitions. The question is one of policy: What evidence of extrinsic conduct referred to in a will may be admitted to affect its provisions without encroaching too greatly upon the preventive policy of the Statute of Wills? It may be observed that, stated in terms of policy, incorporation by reference raises essentially the same question.

Although the policy considerations are essentially the same, the doctrines are, in theory, clearly separable. One permits certain extrinsic *writings* to be read as part of a will; the other permits certain *facts* to be shown in order to ascertain with certainty the beneficiaries and bequests of a will. The *writing*, to satisfy its doctrine, must be in existence at the time of execution of the will. The *fact* may exist by virtue of acts performed either prior or subsequent to execution of the will. Nevertheless, when a writing is involved, courts sometimes find it incapable of incorporation by reference, and fail to consider the possibility that it may be evidence of a fact having the requisite independent significance.

It is obvious that evidence would be admitted by any court to ascertain the beneficiaries of a devise to "my children" or "my wife." The validity of gifts to "the woman I marry,"[24] to "such persons as shall care for me in my last illness,"[25] to "such person as shall maintain me and furnish me with medical treatment while I live,"[26] to "such persons as shall be in my employ at my death,"[27] or to persons "to whom I may have disposed of my said business"[28] may also be considered unquestion-

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[21]Atkinson entitles his discussion "Reference to Non-testamentary Acts," and speaks of acts having "ordinarily independent significance," "significance independent of testamentary purpose," and "normally independent purpose." ATKINSON, WILLS § 144 (1937); Evans entitles his discussion "Identification of Beneficiary or Property by Subsequent Non-testamentary Act," and speaks of "a legal act complete in itself and executed for independent reasons" and of acts "performed not for the purpose of complementing the will but for a purpose complete in itself." Evans, *op. cit. supra* note 2, at 891, 894. Illustrations might be multiplied, but little, if any, enlightenment would be gained. A precise definition of "acts of independent significance" is little more likely than a precise definition of "negligence" or "duty."

[22]Denio, J., in Langdon v. Astor's Ex'rs, 16 N.Y. 1, 26 (1857).

[23]Samuels, *op. cit. supra* note 15 at 276.

[24]Brooke v. Kent, 3 Moore P.C. 334, 13 Eng. Rep. 136 (1840).

[25]Lear v. Manser, 114 Me. 342, 96 Atl. 240 (1916); In re Oggier's Estate, 153 Pa. Super. 216, 33 A.2d 439 (1943).

[26]Dennis v. Holsapple, 148 Ind. 297, 47 N.E. 631 (1897); Bosserman v. Burton, 137 Va. 502, 120 S.E. 261 (1923).

[27]In re Hollingsworth's Estate, 37 Cal. App. 2d 432, 99 P.2d 599 (1940); Howe v. Sands, 141 Fla. 813, 194 So. 798, 142 Fla. 625, 195 So. 609 (1940), 147 Fla. 742, 3 So.2d 723 (1941); Abbott v. Lewis, 77 N.Y. 94, 88 Atl. 98 (1913); Metcalf v. Sweeney, 17 R.I. 213, 21 Atl. 364, 33 Am. St. Rep. 864 (1891).

[28]Stubbs v. Sargon, 3 My. Cr. 507, 40 Eng. Rep. 1022 (1838).

able.[29] In all these cases, the ultimate beneficiary will be determined by a fact the existence of which is not solely dependent upon the testator's desires. The independent significance of what may be termed the "contents" cases is not so clear. Where the testator bequeaths the contents of a house, room, "trunk and its contents,"[30] "the contents, if any, of a drawer in said safe,"[31] or of a safe deposit box,[32] it is obvious that the testator may vary the contents from time to time by his unilateral act with no other purpose in mind than to affect his bequests.[33] Nevertheless, these bequests have been upheld in numerous cases. In others,[34] they have been invalidated as attempted reservations of power to alter testamentary dispositions without complying with the provisions of the Statute of Wills.

In anticipation of the subsequent discussion herein of the application of this doctrine to inter vivos trusts referred to in a will, this observation may be made: If the act is one which may be performed by the testator *alone*, as is the creation of a trust or its subsequent amendment under reserved power to do so, there is a greater likelihood that the act will be considered testamentary rather than independently significant than if the act is one which must be performed by the testator *in conjunction with* some other person.[35]

Incorporation of Inter Vivos Trust Instruments

When the inter vivos trust is not amendable, no difficulty should be encountered in securing its incorporation into a will in those states which recognize the doctrine, provided, of course, the orthodox requirements are met. It is in the attempted incorporation of amendable trusts that partial or total frustration is encountered. Bearing in mind the requirements that to be incorporable the document must be in existence at the time of execution of the will, and that the will must refer to it as a document in existence and manifest the testator's intention to incorporate it therein, two important considerations are obvious: (1) What effect upon incorporability does the mere fact of amendability have; and, (2) what is the effect, if any, of the fact that amendments were, or were not, made?

The decisions warrant the following categorization:

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[29]Other examples: Allan v. Brown, 61 R.I. 56, 199 Atl. 753 (1938) ("unto the person who shall be living with me as my companion at the time of my death"); Cansler v. Unknown Heirs of Chairs, 35 Tenn. App. 631, 250 S.W.2d 579 (1952) ("to the person or persons who shall stay with me in my home continuously during my last illness").

[30]Appeal of Magoohan, 117 Pa. 238, 14 Atl. 816, 2 Am. St. Rep. 660 (1887).

[31]Gaff v. Cornwallis, 219 Mass. 226, 106 N.E. 860 (1914).

[32]Matter of Thompson, 217 N.Y. 111, 111 N.E. 762 (1916).

[33]*Compare* Matter of Angle, 147 Misc. 445, 264 N.Y. Supp. 29 (Sur. 1933), *with* In re LeCollen's Will, 190 Misc. 272, 72 N.Y.S.2d 467 (1947), noted in 22 St. John's L. Rev. 299 (1948). And see McNeill v. McNeill, 261 Ky. 240, 87 S.W.2d 367 (1953); Daniel v. Tyler's Ex'r, 296 Ky. 808, 178 S.W.2d 411 (1944); Hessmer v. Edenborn, 196 La. 575, 199 So. 647 (1940), noted in 40 Mich. L. Rev. 492 (1942) and 15 Tul. L. Rev. 322 (1941); Buchwald v. Buchwald, 175 Md. 103, 199 Atl. 795 (1938); Hastings v. Bridge, 86 N.H. 247, 166 Atl. 273 (1933).

[34]*E.g.*, Hastings v. Bridge, *supra* note 33.

[35]See, *e.g.*, Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513, 24 A.L.R. 156 (1st Cir. 1921).

1. The mere reservation of power to amend the trust renders it unincorporable; whether or not it has in fact been amended is of no significance.[36]

2. The trust is incorporable even though amendable, and even though amended, but only the original trust agreement and any amendments thereto made prior to the execution of the will, or codicils thereto, may be incorporated.[37]

Atwood v. Rhode Island Hospital Trust Co.[38] is considered the leading case in support of the proposition that a trust's mere amendability renders it unincorporable. The testator-settlor executed a trust agreement reserving to himself the net income for life and full power to "add to, change, or modify," and designating particularly the disposition to be made of corpus and income after his death. On the same day, but subsequent to the execution of the trust, testator executed his will, the ninth clause of which gave the remainder of his property "to my said executors, . . . with power to sell . . . and pay . . . the proceeds over to . . . [the trustee of the inter vivos trust] . . . to be held, managed and disposed of as a part of the principal . . . held by it in trust . . . in the same manner as though the proceeds of such sales had been deposited by me as a part of said trust estate. . . ." Two subsequent amendments to the trust were made, but the effect of these amendments was not in issue. The court said:

> "Reading the ninth clause of the will in connection with the trust instrument, which contains full power of revocation and modification, . . . [testator] . . . said: 'I give the residue of my estate to said trust company to be disposed of to such persons and in such proportions as I may have instructed or shall hereafter instruct said company.'
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> "Manifestly, then, the real disposition of this residuary estate is made, not by the will, but by the *shifting provisions in the trust instrument.* No amount of discussion or elaboration could make plainer the absolute destruction by such plan of the safeguarding provisions in the Statute of Wills." (Emphasis added.)

In *President and Directors of Manhattan Co. v. Janowitz*,[39] the trust had been amended both prior and subsequent to the will. The court, faced with Justice Cardozo's holding in *In re Rausch's Will*[40] that despite

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[36]Boal v. Metropolitan Museum of Art, 298 Fed. 894 (2d Cir. 1924); Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513, 24 A.L.R. 156 (1st Cir. 1921); President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940), *but see* In re Snyder's Will, 125 N.Y.S.2d 459 (Sur. 1953).

[37]Montgomery v. Blankenship, 271 Ark. 357, 230 S.W.2d 51, 21 A.L.R.2d 212 (1950), noted in 6 ARK. L. REV. 496 (1952); Continental Nat. Bank & Trust Co. v. Art Institute, 409 Ill. 481, 100 N.E.2d 625 (1951); Stouse v. First Nat. Bank, 245 S.W.2d 914 (Ky. 1951); Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935); Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 197 N.E. 419 (1934); In re Shintz' Will Trusts, [1951] 1 Ch. 870; In re Edwards' Will Trusts, [1948] 1 Ch. 440.

[38]275 Fed. 513, 24 A.L.R. 156 (1st Cir. 1921).

[39]260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940).

[40]258 N.Y. 327, 179 N.E. 755 (1932).

the New York rule against incorporation, the provisions of an unamendable and irrevocable trust might be read into a will, distinguished the cases on the point of amendability and revocability.[41] The court's reasoning was substantially the same as that in the *Atwood* case, but one further point which it made is worthy of note. Pointing out that under the doctrine of incorporation by reference, any amendments subsequent to the will cannot be incorporated, the court said that "if the property is to pass under the original and three supplemental indentures [those executed prior to the will], . . . then the intention of the testator is frustrated because he intended that his property should be disposed of as provided in the original and four supplemental indentures."[42]

In re York's Estate[43] illustrates the position of several courts[44] that the trust instrument and all amendments thereto made prior to the last will or codicil are incorporable. The amendable trust was amended several times, but not after the testator's last codicil. The court stated its understanding of the rule in this manner:

> "Although the inter vivos trust is not shown to have been executed in compliance with the Statute of Wills, . . . the validity of the desired disposition of the residue of the estate according to the terms of the trust deed is sustained by the weight of authority. . . . Disposition by addition to a previously created trust, even though the trust be subject to modification, is clearly valid in relation to the trust in the form which it took at the time of execution of the will."[45]

In theory, when a trust instrument has been incorporated into a will, it has a dual significance. On the one hand, it is a trust agreement and, as such, is subject to any power which the settlor may have retained over it. On the other hand, it is *part of a will* and, as such, can be modified or revoked only in the manner provided for modification or revocation of a will. Thus, when the sequence of events is trust instrument, will, and then trust amendment (and no subsequent codicil), the result will be, under the holdings illustrated by *York's Estate,* an inter vivos trust disposition in accordance with the trust and its amendment, but a testamentary trust disposition in accordance with the original trust agreement. This was the situation and result in *Koeninger v. Toledo Trust Co.*[46] The plaintiff conceded that the will incorporated

41"There the trust agreement was fixed and 'enduring as the inscription on a monument.' Here the settlor reserved the right to alter and revoke the trust indenture and, in fact, modified it both prior and subsequent to the execution of his will." 260 App. Div. 174, 21 N.Y.S.2d at 236.

42260 App. Div. 174, 21 N.Y.S. 2d at 237. See also, to the same effect, In re Jones [1942] 1 Ch. 328. It is interesting to note that a New York Surrogate held in 1953 that an amendable trust which had not in fact been amended was incorporable. The Surrogate reasoned that since *In re Rausch's Will* had held an unamendable trust incorporable, and the *Janowitz* case had, in his view, held only that an amendable trust *which had in fact been amended* was unincorporable, the question before him was open in New York. In re Synder's Will, 125 N.Y.S.2d 459 (Sur. 1953). The tenability of this position is decidedly doubtful.

4365 A.2d 282 (N.H. 1949).

44See note 37 *supra.*

4565 A.2d at 283.

4649 Ohio App. 490, 197 N.E. 419 (1934). See also, Fifth Third Union Trust Co. v. Wilensky, 79 Ohio App. 73, 70 N.E.2d 920 (1946).

the original trust instrument, but argued, in vain, that since the trust had been amended subsequent to the will and the amendment could not be incorporated, the residuary devise to the trustee should fail. The defendant's contention that the original trust instrument became a part of the will by incorporation, and that the testamentary trust thereby created could not be affected by the execution of an amendment to the inter vivos trust not executed in conformity with the Statute of Wills, prevailed. The court said:

> "It is true the original trust agreement reserved the right to alter, change, or extend that agreement, but when the donor carried that trust agreement into his will he *waived* this right if not done by an instrument complying with the statute of wills." (Emphasis added.)[47]

While the court's expression of the rule in terms of "waiver" is novel, the result is the same. In view of the fact that testators generally consider the testamentary trust as the culmination of an integrated plan of estate disposition, it is difficult to believe that they intend the result reached. But under the accepted view that a document to be incorporated must be in existence at the time the will is executed, the result is unassailable. The remedy, of course, lies in the execution of a codicil after the execution of each trust amendment.

Inter Vivos Trust Instruments as Acts of Independent Significance

There are very few cases applying the doctrine of acts of independent significance to an inter vivos trust. Some of these have considered the creation of the trust an act of independent significance,[48] others have not.[49] But in addition to an irreconcilable background of case authority, reliance on the doctrine to sustain pour over provisions is likely to be misplaced because of its inherent uncertainty. Whether a trust will be found to have independent significance will depend upon the supposed purpose—or, perhaps, primary purpose—of the testator in establishing it. This is a guessing game, and no estate advisor is likely to advise a client to entrust the disposition of his estate to its outcome. And when, as has been previously noted, the act is one evidenced by a trust instrument, there is a further danger that the court will, because a *writing* is involved,

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[47] 49 Ohio App. 490, 197 N.E. at 420, 421.

[48] Wells Fargo Bank v. Superior Ct., 32 Cal. 2d 1, 193 P.2d 721 (1948); Swetland v. Swetland, 102 N.J. Eq. 294, 140 Atl. 279 (1928); *but see* Clark v. Citizen's Nat'l Bank, 38 N.J. Super. 69, 118 A.2d 108 (1955). See also Stouse v. First Nat. Bank, 245 S.W.2d 914 (Ky. 1951), where the court said: "Although we have not based our decision on the doctrine of independent significance we may mention, in passing, that Scott, in his work on Trusts, makes a forceful argument in support of the proposition that an amendable trust instrument, whether made before or after the execution of the will, should be permitted to be resorted to for the purpose of identifying the beneficiaries and determining their interests in the estate, on the theory that the trust instrument and the amendments are facts having a significance apart from the disposition of the property bequeathed. Scott on Trusts, Vol. 1, p. 299." 245 S.W.2d at 920.

[49] Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513, 24 A.L.R. 156 (1st Cir. 1921) (but see Judge Bingham's dissent); President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940); *but see* In re Rausch's Will, 258 N.Y. 327, 179 N.E. 755 (1932).

examine and find unsatisfied the doctrine of incorporation by reference, and fail even to consider the writing as an act.[50]

In favor of the doctrine it may be observed that to have independent significance an act need not be performed at any particular time. It may be performed either before or after the execution of a will. Thus, were it not for its inherent uncertainty and the danger that the court will overlook it altogether, the doctrine might be a useful device for saving trust amendments made after the execution of the will—those beyond the assistance of incorporation by reference; but, here again, the amendable trust may fall victim to the court's conclusion that "the reservation of the power to amend the trust indenture and its repeated exercise eliminated all independent significance that might be attached to the trust indenture."[51]

Conclusion

If the doctrine of incorporation by reference is firmly established in his jurisdiction, an estate owner may safely create a testamentary trust by incorporating an unamendable inter vivos trust into his will. If his jurisdiction clearly recognizes the incorporability of an amendable inter vivos trust, even though it is amended subsequent to execution of the will, he may safely rely on the technique of incorporation if he executes a codicil after each amendment and sufficiently refers to and identifies therein the original trust instrument and all amendments. The doctrine of acts of independent significance, it is submitted, is totally valueless as a basis upon which to plan an estate with even minimum certainty in practically all the states.[52] If these conclusions are correct, it follows that in many states, and certainly in Mississippi, the only safe course to follow is to spell out the testamentary trust in full in the will.[53] The relative advantages which might have been gained from the other course must be foregone.

No Mississippi counsellor, we may be sure, will deliberately recommend incorporation by reference or reliance on a finding of independent significance in the fond hope that the Mississippi Supreme Court will sustain the gamble. Perhaps it would, perhaps not. The doubt forecloses the question. The advantages of mere reference in the will, then, would seem to be denied in Mississippi in the absence of legislation, for certainty before the fact is essential. Connecticut,[54] Indiana,[55] Illinois,[56] and North Carolina have recently enacted statutes which specify what can be done. North Carolina's statute is particularly liberal and specific. It provides:

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[50]*E.g.*, Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 197 N.E. 419 (1934).

[51]President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232, 237 (2d Dep't 1940).

[52]See 1 SCOTT, TRUSTS § 54.3 (1939); Scott, *Trusts and the Statute of Wills*, 43 HARV. L. REV. 521 (1930).

[53]See Palmer, *Testamentary Dispositions to the Trustee of an Inter Vivos Trust*, 50 MICH. L. REV. 32 (1951); Lauritzen, *Can a Revocable Trust be Incorporated by Reference?*, 45 ILL. L. REV. 583 (1950); Shattuck, *"Pour Over" Trusts: A Renewed Warning to Draftsmen*, 91 TRUSTS & ESTATES 207 (1952).

[54]"No devise or bequest given in any will or codicil shall be deemed invalid by reason of any reference therein to any document creating a trust, *which document was executed and acknowledged by the testator and witnessed by at least two persons,*

> "Devise or bequest to trustee of an existing trust. —A devise or bequest in a will duly executed pursuant to the provisions of this Chapter may be made in form or substance to the trustee of a trust established in writing prior to the execution of such will. Such devise or bequest shall not be invalid because the trust is amendable or revocable or both by the settlor or any person or persons; nor because the trust instrument or any amendment thereto was not executed in the manner required for wills; nor because the trust was amended after execution of the will. Unless the will provides otherwise, such devise or bequest shall operate to dispose of property under the terms of the trust as they appear in writing at the testator's death and the property shall not be deemed held under a testamentary trust. An entire revocation of the trust prior to the testator's death shall invalidate the devise or bequest."[57]

Mississippi should follow suit.

William D. Adams

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and was in existence at the time of the execution of such will or codicil and is identified in such will or codicil by reference to the names of the parties who executed such document and the date of such execution." Conn. Laws 1953, c. 442. (Emphasis added.)

[55]"If a testator devises real or personal property to be added to a trust or trust fund which is clearly identified in his will and which is in existence when his will is executed, such devise shall be valid and effective. Unless the will provides otherwise, the property so devised shall be subject to the terms and provisions of the instrument or instruments governing the trust or trust fund even though amended or modified after the execution of the will." IND. ANN. STAT. § 6-601 (j) (Burns 1953).

[56]"Testamentary additions to trust. By a will signed and attested as provided in this Act a testator may devise and bequeath real and personal estate to a trustee of a trust which is evidenced by a written instrument in existence when the will is made and which is identified in the will, even though the trust is subject to amendment, modification, revocation or termination. Unless the will provides otherwise the estate so devised and bequeathed shall be governed by the terms and provisions of the instrument creating the trust including any amendments or modifications in writing made at any time before or after the making of the will and before the death of the testator." ILL. ANN. STAT. § 194a (Smith-Hurd Supp. 1955). (Effective July 1, 1955.)

[57]N.C. Sess. Laws 1955, c. 388, § 1. (Effective July 1, 1955).

VALIDITY OF STATE LAWS IN THE BANKRUPTCY FIELD

Introduction

Congress, by virtue of Article one, Section eight of the Constitution, has plenary power to establish uniform laws in the bankruptcy field. It is well established that when that power has not been exercised, as has been the case at various times in our history, the field is entirely open for state regulation.[1] However, when Congress has acted, as at the present time through the Federal Bankruptcy Act,[2] it is safe to say that the field has been pre-empted. But that does not solve the question as to just what sort of state legislation in the broad field of insolvent debtors is permissible. The chief problems involved here are the significance of a provision in the state statute for the discharge of the debtor and the application of the doctrine of severability where a part of the state statute is obviously in conflict with the federal law. For the purposes of this Comment the state statutes adequately fall into two categories: (1) Those which purport to be insolvency laws, and (2) those which purport only to regulate the general assignment for the benefit of creditors.

Insolvency Laws

The term "insolvency law" has seen much abuse in its judicial history, and a great deal of case authority has used the term as a legal conclusion. By this approach the characteristics of the state law in question are pointed up and used as a premise; the conclusion drawn is either that the law is an insolvency law or that it is not—if the law is an insolvency law it is further concluded that it is in conflict with the bankruptcy act; whereas if it is not, the opposite conclusion follows. In this Comment the term shall imply that the state statute in jeopardy purports to operate in the field of insolvency otherwise than by regulation of assignments for the benefit of creditors. In these terms the question becomes: What characteristics invalidate a state insolvency law?

In the leading case of *International Shoe Co. v. Pinkus*[3] an Arkansas statute was involved. The statute was designated in its title as an insolvency law and treated as such by the supreme court of the state,[4] and more particularly, it classified creditors and contemplated discharge of the debtor. Appellant became a judgment creditor on the same day that the debtor commenced a suit in a chancery court of Arkansas praying that he be adjudged insolvent under Arkansas law, whereupon the court adjudged him insolvent and appointed a receiver. Appellant brought this suit, seeking payment of the unsatisfied judgment out of the funds in the hands of the receiver. The court alluded to the power of Congress to establish uniform and paramount laws on bankruptcy and the difficulties consequent upon state regulation;[5] it faced, to a degree, the

[1]"It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States." Sturges v. Crowinshield, 4 U.S. (4 Wheat) 529 (1819).

[2]11 U.S.C. §§ 1-112 (1946).

[3]278 U.S. 261 (1928). Three justices dissented.

[4]See, *e.g.*, Hickman v. Parlin-Orendorff Co., 88 Ark. 519, 115 S.W. 371 (1909).

[5]"It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national act is in force.

argument that the proceedings in the chancery court were, in effect, the same as if an assignment for the benefit of creditors had been made;[6] it pointed out that appellant could not invoke the jurisdiction of the bankruptcy court as its claim was less than $500; it pointed out that the debtor was not entitled to discharge under the federal act;[7] and it came to the conclusion that appellant could recover as the state law was superseded as it related to the distribution of property and releases to be given; but the court expressly refused to decide whether independently of statute an assignment for the benefit of creditors on the same conditions would protect the property assigned from an attacking creditor.

Prior to the *Pinkus* case the Supreme Court had decided in *Stellwagen v. Clum*[8] that an Ohio statute providing that a fraudulent conveyance by an insolvent could be declared void at the suit of any creditor and providing for the appointment of a receiver under those circumstances to take charge of all the assets of the debtor for the equal benefit of creditors—but not providing for discharge of the debtor—was not suspended by the bankruptcy act.

State statutes that are clearly insolvency laws are somewhat scarce. The *Pinkus* case is the last Supreme Court decision dealing in any detail with state insolvency laws, and there have been few such cases in the courts of appeal subsequent to *Pinkus*. But in *Hammond v. Lyon Realty Co.*,[9] it was held that the dissolution of a corporation under Maryland insolvency law did not place the corporation beyond the jurisdiction of the federal court in bankruptcy.[10] And in *First Nat. Bank v. Robinson*[11] it was held that the appellant bank had no priority on a loan to the New Mexico receiver acting under the state insolvency law, where federal jurisdiction was subsequently invoked by an involuntary petition, because the New Mexico law was *void*.[12] It was pointed out that discharge was not an essential element of an insolvency law.[13]

Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws." 278 U.S. at 265.

[6]"But the property was not handed over simply for the purpose of the payment of debts as far as it would go; it was transferred pursuant to a statute and decree imposing conditions intended to secure the debtor's discharge." 278 U.S. at 266.

[7]As he had been discharged in voluntary bankruptcy proceedings within six months prior to the filing of the petition in the chancery court.

[8]245 U.S. 605 (1917).

[9]59 F.2d 592 (4th Cir. 1932).

[10]The proceedings under Maryland law were involuntary in character and were followed by an involuntary petition in bankruptcy. The court decided nothing further than that in the specific case the Maryland laws, by dissolving the corporation, did not preclude bankruptcy jurisdiction.

[11]107 F.2d 50 (10th Cir. 1939).

[12]"By virtue of the constitutional authority of Congress to enact a uniform system of bankruptcy, the National Bankruptcy Act is paramount and superior to all state laws upon the subject, and all state insolvency laws are suspended in so far as they relate to the same subject-matter and affect the same persons as the National Bankruptcy Act. It follows that the receivership proceeding in the state court was void." 107 F.2d at 53, 54.

[13]"From the foregoing it will be seen that the New Mexico statute is essentially an insolvency act and covers substantially the same field as the National Bankruptcy Act. While the New Mexico act does not make express provision for the discharge of the corporate debtor, it does provide for the distribution of its assets and the dissolution of the corporation, unless a reorganization is effected. An express provision for discharge is not an essential element of an insolvency law." 107 F.2d at 53.

In spite of the fact that there is much ado about discharge in the cases dealing with permissible state action, discharge is not essential to conflict with the federal bankruptcy laws if there is actually an insolvency law—as distinguished from regulation of assignments—involved. Quite the opposite is true. It takes no small amount of imagination to interpret the *Pinkus* case as making discharge essential, and in addition to the two above-cited court of appeal cases the preponderance of authority is to the contrary.[14]

State Regulation of Assignments for the Benefit of Creditors

A more difficult question is presented when the state statute purports to deal with general assignments for the benefit of creditors. Here conflict with the bankruptcy act is much less obvious.

The majority of these statutes simply regulate the administration of the trust[15] by requiring that the trustee post bond, make reports to the proper state court, and submit generally to the supervision of that court. There is no doubt at the present time that these laws are valid[16] as against the National Bankruptcy Act.[17] However, there is also no doubt that the proceedings under them will be transferred[18] into the jurisdiction of a bankruptcy court upon a timely voluntary petition[19] by the debtor[20] or a timely involuntary petition[21] by a creditor,[22] and a petition for a turn over order by the trustee in bankruptcy. But, on the other hand, should the petition be instituted more than four months after the assignment, a turn over order will not issue from the bankruptcy court.[23]

[14]In re Weedman Stave Co., 199 Fed. 948 (C.C.E.D. Ark. 1912) (Arkansas receiver sought dissolution of a restraining order that had followed a petition in bankruptcy more than four months after the state receivership.) "The elements of an insolvency law are insolvency, surrender of property, its administration by a receiver or trustee, distribution of the assets among the creditors, and a provision for priorities or other matters not permissible in the absence of such a statute. A discharge of the debtor from the unpaid balances of his debts is not essential to make it an insolvency law." 199 Fed. at 950. In re Salman & Salman, 143 Fed. 395 (C.C.W.D. Mo. 1906) (invalidating Missouri laws for the winding up of failing banking businesses by the Missouri Secretary of State); In re Wisconsin Builders Supply Co., 136 F. Supp. 439 (E.D. Wis. 1955). See also In re Smith, 92 Fed. 135 (C.C. Ind. 1899). *But see* Stevens v. Carolina Scenic Stages, 208 F.2d 332 (4th Cir. 1953) (where there was a voluntary petition in bankruptcy some two years after the inception of a voluntary receivership in South Carolina).

[15]See, *e.g.*, MISS. CODE ANN. §§ 298-306 (1942).

[16]"It [Ohio law] does not compel, or in terms even authorize assignments; it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. . . . There is nothing in the Act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors." Mayer v. Hellman, 91 U.S. 496, 502 (1875). See also Johnson v. Star, 287 U.S. 527 (1932); Pobreslo v. Boyd Co., 287 U.S. 518 (1932).

[17]11 U.S.C. §§ 1-112 (1946).

[18]See Pobreslo v. Boyd Co., 287 U.S. 518 (1932).

[19]Under 11 U.S.C. § 95 (a) (1946).

[20]See Stevens v. Carolina Scenic Stages, 208 F.2d 332 (4th Cir. 1953); First Nat. Bank v. Weaver, 296 Fed. 112 (3d Cir. 1924).

[21]Under 11 U.S.C. § 95 (b) (1946), which makes the general assignment an act of bankruptcy.

[22]See In re Sievers, 91 Fed. 366 (C.C.E.D. Mo. 1899); In re Smith, 92 Fed. 135 (C.C.D. Ind. 1899). See also Stevens v. Carolina Scenic Stages, 208 F.2d 332 (4th Cir. 1953); First Nat. Bank v. Weaver, 296 Fed. 112 (3d Cir. 1924).

[23]Because 11 U.S.C. § 11 (a) (21) (Supp. 1955), so stipulates. See Mayer v. Hellman, 91 U.S. 496 (1875) (The period was six months rather than four under the act

However, some of the state statutes governing assignments for the benefit of creditors have provided for discharge, insofar as consenting creditors are concerned, if a given percentage should be paid or for discharge regardless of the percentage; or, the debtor, without the aid of any statute, may require a release from his creditors as a condition of participation. In the case of a stipulation by the debtor requiring release there is a split of authority as to whether the transaction is a fraudulent conveyance and subject to attack by any dissenting creditor.[24] Professor Glenn is of the opinion that the transfers should be upheld, provided there is no further stipulation in the assignment to the effect that any surplus should revert to the debtor-grantor, and is thus at the disposal of the dissenting creditors.

In *Boese v. King*[25] a judgment creditor with a New York judgment made an attack by suit in New York upon receivership proceedings in New Jersey which had been brought about by a voluntary assignment under New Jersey law. The Supreme Court was of the opinion that even assuming that the statute of New Jersey—which included a discharge provision—was suspended by the Bankrupt Act of 1867, it did not follow that the assignment was "ineffective for every purpose." Great emphasis was laid upon the fact that the attacking creditors could have invoked the jurisdiction of the bankruptcy court and did not. The net effect of the holding was that although the discharge provision of the New Jersey statute was suspended by the federal act, the assignment was not void, and the fact that the creditors had neglected the bankruptcy court was conclusive.

In *Pobreslo v. Boyd Co.*[26] an assignment for the benefit of creditors was made under Wisconsin statutory law, which contained provisions relating to the discharge of the debtor. Appellant, a non-assenting creditor, pressed her claim to judgment after the assignment and then brought garnishment proceedings against the assignee (subsequently the assignee was replaced by a trustee with the consent of the assignor, the trustee being the appellant). The Supreme Court held that because of the interpretation put upon the Wisconsin law by the state supreme court in *In re Tarnowski*[27]—declaring the discharge provisions inoperative because of the bankruptcy act but severable from the provisions relating to voluntary assignments—the assignment was not in conflict with the federal act.

In *Johnson v. Star*,[28] it seems that the Supreme Court went even further. Appellants, non-assenting creditors, obtained a judgment prior

in force at the time and had lapsed after the assignment.); Stevens v. Carolina Scenic Stages, *supra* note 22 (voluntary petition some two years after the inception of the state court voluntary receivership); First Nat. Bank v. Weaver, *supra* note 22 (voluntary petition filed more than four months after the confession of a judgment, which under a Pennsylvania statute led to a receivership as to the judgment for the benefit of *all* creditors); GLENN, LIQUIDATION § 579 (1935); Annot., 75 L. Ed. 1060 (1930).

[24]See GLENN, *op. cit. supra* note 23, § 119.

[25]108 U.S. 379 (1882).

[26]287 U.S. 518 (1932).

[27]191 Wis. 279, 210 N.W. 836 (1926).

[28]287 U.S. 527 (1932).

to a voluntary assignment of all property for the benefit of creditors under Texas statutes and subsequently instigated garnishment proceedings against appellee-assignee. As in *Pobreslo* the Supreme Court held the assignment not in conflict with the federal act because of the state supreme court's interpretation[29] of the statutes. Most significant is the fact that the Texas case of *Haijek v. Luck*[30] held in no uncertain terms that although the statutory provisions for discharge upon a general assignment were inoperative, a debtor might stipulate for release in the assignment and be discharged from liability as to assenting creditors if there was no timely proceeding in bankruptcy; the Supreme Court pointed out specifically what the case held. It is an inescapable inference that the Court indorsed that opinion.

In the recent case of *In re Wisconsin Builders Supply Co.*[31] Wisconsin statutes[32] were again[33] called into question, although they were drastically changed from what they had been at the time of *Pobreslo.* Proceeding, obviously, under the impression that discharge, and only discharge, was the nemesis, the state legislature enacted a law which purported to regulate assignments but in fact paralleled[34] the federal act, except in the one instance that there was no provision for discharge of the debtor. Thus, although the law dealt in fact with assignments, it presented also a comprehensive scheme for the voluntary and involuntary administration of insolvent estates. The court pointed out in passing that discharge with regard to corporations is meaningless and held that the Wisconsin law was not subject to severability and is suspended during the existence of the Federal Bankruptcy Act, and therefore that the enjoining of the state receiver and the turn over order were proper in spite of the four months' lapse after the state regulated voluntary receivership.

Conclusion

When state laws are couched in terms of an insolvency system and encroach upon the bankruptcy field, they are superseded and little likely to be adaptable to severability. This general statement and the following observations are offered. A discharge provision is not essential for conflict with the bankruptcy law, but is conclusive if present. The involuntary character of the proceedings is probably more important than the cases would imply, but is permissible if based upon a fraudulent conveyance as in *Stellwagen v. Clum.* Classification of creditors is no doubt of some significance.

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[29]Haijek v. Luck, 96 Tex. 517, 74 S.W. 305 (1903); Patty-Joiner & E. Co. v. Cummins, 93 Tex. 598, 57 S.W. 566 (1900).

[30]*Supra* note 29.

[31]136 F. Supp. 439 (E.D. Wis. 1955).

[32]WIS. STAT. §§ 128.01-128.20 (1951).

[33]See Pobreslo v. Boyd Co., 278 U.S. 518 (1932).

[34]As to the definition of insolvency, acts of bankruptcy (five of the six), involuntary insolvency, invocation of jurisdiction within four months, definition of preference, voidability of preferences, meetings of creditors given control over the proceedings, dismissal of voluntary proceedings, dismissal following lack of prosecution, limitation of time within which claims might be filed (three months rather than six months), enjoining of other proceedings by creditors, determination of disputed claims, order of distribution, the "strong arm" provision, and legislating title out of the debtor without a conveyance.

On the other hand, when state laws are couched in terms of assignment, and do in fact deal exclusively with assignments, and do not provide for discharge of the debtor, they are valid; but the proceeding under them is subject to the proper invocation of federal jurisdiction. However, should such a statute provide for discharge, it is probably superseded in its entirety in the absence of a decision by the highest court of the state declaring the discharge provision inoperative—for without the decision severability is not likely to prevail. Yet, under the authority of *Johnson v. Star* the debtor may provide for release in an otherwise statutory assignment and the release is operative. It is submitted that the discharge is operative in both cases or inoperative in both cases—preferably operative. There is no basis for distinction; for how is it, for the purpose of determining conflict with the bankruptcy act, that a state-dictated discharge is different from a debtor-dictated discharge where both are enforced by the state court?

When the state law purports to deal with assignments, but goes on to deal with proceedings and remedies not properly within the province of assignments for the benefit of creditors but within the bankruptcy field, the problem of severability is again raised, as was brought out in *In re Wisconsin Builders,* and the part regulating assignments may fall as a part of a system in conflict with the bankruptcy laws. Again a state decision might be pertinent.

Lester Stanley Cook, Jr.

RECENT DECISIONS

CONSTITUTIONAL LAW—CLEAR AND PRESENT DANGER AS APPLIED TO THE SMITH ACT

Appellant was indicted[1] and convicted in the United States District Court for the Middle District of North Carolina under the membership clause of the Smith Act.[2] It was admitted that he was a member of the Communist Party of the United States during the period covered by the indictment and was chairman of the North and South Carolina district of the party. The question presented on appeal was the constitutionality of the membership provision of the Smith Act. HELD: Affirmed. The provision of the Smith Act penalizing membership in a group advocating overthrow of the government by force and violence by one who becomes or remains a member thereof knowing of its criminal purposes is constitutional. *Scales v. United States*, 227 F.2d 581 (4th Cir. 1955).[3]

Freedom of speech as guaranteed by the first[4] and fourteenth[5] amendments of the Constitution of the United States is not an absolute and unequivocal right but is subject to legislative limitation and regulation,[6] the validity of which is dependent on the time and circumstances.[7] During the early part of this century the criterion for the determination of the limits of freedom of speech was whether the exercise of such freedom created a clear and present danger of bringing about evils which the legislature had a right to prevent.[8] This rule was accepted as a standard and pur-

[1]The indictment charged: (1) that the Communist Party of the United States is a group teaching and advocating the overthrow and destruction of the United States Government by force and violence as speedily as circumstances will permit; (2) that defendant was a member of the party; (3) that while a member of the party, he knew of its teachings and purposes; (4) that he intended to bring about the overthrow of the government by violence.

[2]"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; *or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof,* shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction." (Emphasis added.) 54 STAT. 671 (1940), as amended, 18 U.S.C.A. § 2385 (Supp. 1955).

[3]*Petition for cert. filed*, 24 U.S.L. WEEK 3198 (U.S. Jan. 16, 1956) (No. 626), *cert. granted*, 24 U.S.L. WEEK 3252 (U.S Mar. 26, 1956) (No. 626). Recent similar cases: United States v. Lightfoot, 228 F.2d 861 (7th Cir. 1956), *petition for cert. filed*, 24 U.S.L. WEEK 3211 (U.S. Feb. 3, 1956) (No. 661), *cert. granted*, 24 U.S.L. WEEK 3252 (U.S. Mar. 26, 1956) (No. 661); United States v. Blumberg, 136 F. Supp. 269 (E.D. Pa. 1955).

[4]"Congress shall make no law . . . abridging the freedom of speech, or of the press;. . . "

[5]Cantwell v. Connecticut, 310 U.S. 296 (1940); Gitlow v. New York, 268 U.S. 652 (1925).

[6]Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, *supra* note 5; Ahrams v. United States, 250 U.S. 616 (1919).

[7]Schenck v. United States, 249 U.S. 47 (1919) at 52, where Justice Holmes stated: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

[8]Whitney v. California, 274 U.S. 357 (1927). "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an

portedly followed in subsequent prosecutions under the Espionage Act of 1917.[9] However, the ambiguity of the rule has enabled courts to make pronounced deviations from the original connotation while not necessitating the explicit abandonment of the rule. As a result subsequent cases have made marked departures from Justice Brandeis' definition of "clear and present danger" or have chosen to hold the rule inapplicable.[10] In such cases courts have upheld the validity of various state statutes designed to curb and punish criminal anarchy, criminal syndicalism,[11] and sedition[12] on the basis that such statutes import a legislative determination that such utterances or acts involve danger of a substantial evil.[13] This doctrine of statutes "encased in the armor wrought by prior legislative deliberation"[14] was subsequently followed in litigation[15] testing the constitutionality of the non-communist oath provision of the Taft-Hartley Act,[16] the Court balancing the probable effects of the statute upon the exercise of free speech against the congressional determination that political strikes are evils which cause substantial harm to interstate commerce.[17]

Since its enactment the Smith Act of 1940[18] has been a primary source of freedom of speech litigation in the federal courts.[19] Among these decisions the most far-reaching prior to the decision in the noted case and the one containing the most varied treatment of "clear and present danger" is *Dennis v. United States*.[20] In that case four members[21] of the Court adopted the lower court's new interpretation and

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emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that that there was no emergency justifying it." Justice Brandeis, concurring, 274 U.S. at 377.

[9] 40 STAT. 217 (1917); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).

[10] Frankfeld v. United States, 198 F.2d 679 (4th Cir. 1952), *cert. denied*, 344 U.S. 922 (1953). "In the absence of conspiracy the 'clear and present danger' rule may furnish a satisfactory criterion of criminality in the case of ordinary speeches advocating force and violence; but such rule has no practical application to advocacy of violence in connection with conspiracy to overthrow the government, for the danger of such conspiracies is ever 'clear and present'." 198 F.2d at 682.

[11] CAL. PEN. CODE §§ 11400-02 (1949); Whitney v. California, 274 U.S. 357 (1927); People v. Chambers, 22 Cal. App. 2d 687, 72 P.2d 746 (1937); People v. McClennegen, 195 Cal. 445, 234 Pac. 91 (1925); People v. Steelik, 187 Cal. 361, 203 Pac. 78 (1921); N.H. REV. LAWS c. 457A (1942), as amended, N.H. Laws 1951, c. 193, § 1; Nelson v. Wyman, 99 N.H. 33, 105 A.2d 756 (1954). OHIO REV. CODE § 2923.13 (Page 1953); State v. Kassay, 126 Ohio St. 177, 184 N.E. 521 (1932).

[12] ILL. ANN. STAT. c. 38, §§ 558-564 (Smith-Hurd 1955); People v. Lloyd, 304 Ill. 23, 136 N.E. 505 (1922).

[13] N.Y. PENAL LAW § 161; Gitlow v. New York, 268 U.S. 652 (1925).

[14] Bridges v. California, 314 U.S. 252 (1944).

[15] American Communication Ass'n v. Doud, 339 U.S. 382 (1950).

[16] 49 STAT. 449 (1953), as amended, 29 U.S.C. §§ 141, 159 (h) (Supp. III).

[17] American Communication Ass'n v. Doud, 339 U.S. 382, at 400 (1950).

[18] 54 STAT. 671 (1940), as amended, 18 U.S.C.A. § 2385 (Supp. 1955).

[19] Dennis v. United States, 341 U.S. 494 (1950); United States v. Flynn, 216 F.2d 354 (2d Cir. 1954), *cert. denied*, 348 U.S. 909 (1954); Frankfeld v. United States, 198 F.2d 679 (4th Cir. 1952), *cert. denied*, 344 U.S. 922 (1953); Dunne v. United States, 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943); United States v. Silverman, 129 F. Supp. 496 (D. Conn. 1955); United States v. Schneiderman, 106 F. Supp. 906 (S.D. Cal. 1952).

[20] 341 U.S. 494 (1950), upholding the conviction of certain leaders of the Communist party for conspiracy to advocate the overthrow and destruction of the government by force and violence.

[21] Chief Justice Vinson, Justices Reed, Burton, and Minton.

restatement of "clear and present danger": "In each case courts must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[22] This adoption was prefaced by distinguishing the factual situations in *Gitlow* and *Dennis*.[23] Justice Frankfurter declared that the constitutional immunity of speech is dependent upon its location on the scale of values;[24] and Justice Jackson announced that the application of "clear and present danger" in this context would "hold our Government captive in a judge-made verbal trap."[25]

The court in the noted case has gone further than any other court in prosecutions arising under the Smith Act. While *Dennis* established the constitutionality of the "organization" and "advocacy" clauses of the act, the Court did not consider the membership clause. Although it was not essential to its decision, in *Frankfeld* the court discussed the significance of the membership clause,[26] and this dictum was adopted as the rule in the noted case. As illustrated by recent decisions, the obvious trend away from the conception of "clear and present danger" of Justices Holmes and Brandeis can be justified only by the existence of the dangers created by the Communist party. In light of such circumstances[27] and in view of the important position held by Scales in this movement the conviction for membership in the noted case should be upheld. Whether or not courts will find this departure an acceptable standard in later prosecutions of the rank and file of the Communist party is a question which cannot be answered by the decision in this case.

James F. McKenzie

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[22]United States v. Dennis, 183 F.2d 201 (2d Cir. 1950). Circuit Judge Learned Hand delivered the opinion of the court.

[23]"The situation with which Justices Holmes and Brandeis were concerned in Gitlow was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community. . . . They were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis." 341 U.S. at 510.

[24]341 U.S. at 544.

[25]341 U.S. at 561.

[26]"So far as membership in an organization advocating such destruction or overthrow is concerned, such membership is condemned only where there is knowledge on the part of the accused of the unlawful purpose of the organization. Membership in an organization renders aid and encouragement to the organization; and when membership is accepted or retained with knowledge that the organization is engaged in an unlawful purpose, the one accepting or retaining membership with such knowledge makes himself a party to the unlawful enterprise in which it is engaged." 198 F.2d at 683.

[27]Dennis v. United States, 341 U.S. 494 (1950) at 561, Justice Jackson concurring: "This prosecution is the latest of never-ending, because never successful, quests for some legal formula that will secure an existing order against revolutionary radicalism. It requires us to reappraise, in the light of our own times and conditions, constitutional doctrine devised under other circumstances to strike a balance between authority and liberty."

EASEMENTS—EXTENSION OF ELECTRIC POWER TRANSMISSION LINES

Landowner brought action to recover damages for loss of timber destroyed by electric power supplier when the supplier attempted to construct a take off line to serve another customer. The easement granted to the power company "the right to enter upon the lands of the undersigned, . . . and to place, construct, operate, maintain, relocate and replace thereon and in or upon all streets, roads or highways abutting said lands *an electric transmission or distribution line or system,* and to cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric lines or system and to cut down from time to time all dead, weak, leaning or dangerous trees that are tall enough to strike the wires in falling." (Emphasis added.) A single line to the landowner's residence was first constructed. Four years later this line was extended to another residence about 200 feet away. The present suit was brought when the electric power supplier began construction of another extension fifteen years after the easement was granted. HELD: The electric power supplier had no right under this grant to extend the right of way in order to serve other landowners in the neighborhood even though the easement grant was a general one as to the extent of burden and did not fix the location of the right of way, its length, or its terminal points. *Capital Electric Power Ass'n v. Hinson,* 84 So.2d 409 (Miss. 1956).

It is a well established general rule that once a general easement is established by agreement of the parties, it cannot afterwards be changed by either dominant or servient tenant without the consent of the other.[1] The owner of a right of way cannot materially increase the burden of the servient estate nor impress a new and additional burden thereon.[2] However, courts have also stated that a normal development in use by the easement holder is permissive.[3] In Mississippi there are very few decisions which consider the limits to an easement couched in general terms. *Quin v. Sabine*[4] involved a change in location rather than extension of an easement, and held that once the location of the right of way is established, it cannot be changed by either party without the other party's consent, except under authority of express or implied grant or reservation to this effect. *Glover v. Falls*[5] involved an implied easement in a timber conveyance which established the privilege of ingress and egress, routes being already in existence. These routes were held to be sufficient. There was no express grant to relocate and replace or change the location of the routes. Neither of these cases concerns an easement which is an express grant of a right of way for an "electric transmission or distribution line or system" as in the present case. When an easement is acquired by express grant the extent of the right of way depends upon the terms of the grant.[6] Even though the grant in this case authorized the construction of a transmission "system" which right had only been exercised in part by the power company, yet the court held the purpose of the easement had been

[1]Youngstown Steel Products Co. v. Los Angeles, 38 Cal. 2d 267, 240 P.2d 977 (1952); Wanders v. Nelson, 98 Cal. App. 2d 267, 219 P.2d 852 (1950); Snodgrass v. Crane, 57 Cal. App. 2d 565, 134 P.2d 862 (1943); Sibbel v. Fitch, 182 Md. 323, 34 A.2d 773 (1943); Cozby v. Armstrong, 205 S.W.2d 403 (Tex. Civ. App. 1947).

[2]Pinkerton v. Pritchard, 71 Ariz. 117, 223 P.2d 933 (1950); Percy A. Brown & Co. v. Raub, 357 Pa. 271, 54 A.2d 35 (1947); Pennsylvania Water & Power Co. v. Reizart, 127 Pa. Super. 600, 193 Atl. 311 (1937); Tennessee Pub. Serv. Co. v. Price, 16 Tenn. App. 58, 65 S.W.2d 879 (1932).

[3]Williams v. Northern Natural Gas Co., 136 F. Supp. 514 (N.D. Iowa 1955); Loughman v. Couchman, 242 Iowa 885, 47 N.W.2d 152 (1951).

[4]183 Miss. 375, 183 So. 701 (1938).

[5]120 Miss. 201, 82 So. 4 (1919).

[6]Frederick v. Louis, 10 Cal. App. 2d 649, 52 P.2d 533 (1936); West Coast Power Co. v. Buttram, 54 Idaho 318, 31 P.2d 687, 689 (1934); Foshee v. Brigham, 174 Tenn. 564, 129 S.W.2d 207 (1939).

accomplished and no further rights existed in the power company, although the single line which came to a dead end on the property was in no sense a transmission system.

This easement is identical in form with thousands of similar instruments which the electric power supplier in this case, as well as various other electric power suppliers in Mississippi, now hold. There is no doubt the suppliers thought the instruments gave them authority to do any and every act consistent with the establishment of a transmission *system*. As a result of this decision the electric power suppliers will have the additional burden of drawing up future instruments which include this authority. For this reason this decision will be of far reaching importance, of which the court was not unmindful. But, the court said, to hold otherwise would not be consistent with established law which prevents servient lands from being subjected to unlimited future burdens.

Josephine P. Johnson

EVIDENCE—INJUNCTIONS—FEDERAL AGENT ENJOINED FROM MAKING AVAILABLE IN A STATE PROCEEDING EVIDENCE UNLAWFULLY OBTAINED

Petitioner Rea was indicted for the unlawful acquisition of marihuana in violation of federal law.[1] After evidence obtained under a void federal warrant by a federal narcotics agent had been suppressed in a federal district court[2] and the indictment dismissed, the federal agent swore to a complaint before a New Mexico state judge and caused a warrant for Rea's arrest to issue charging Rea with possession of marihuana in violation of New Mexico law. Rea made a motion in the federal district court to enjoin the federal agent from testifying in the state court with respect to the narcotics obtained by the illegal search and to direct the agent to reacquire the evidence[3] seized and destroy it or transfer it to other agents if it was out of the custody of the United States. The motion was denied by the district court, and the court of appeals affirmed.[4] The United States Supreme Court granted certiorari "because of the importance in federal law enforcement of the question presented."[5] HELD: Reversed. Where a federal agent has violated the federal rules governing searches and seizures it is the duty of a federal district court to enjoin him from making available the fruits of his unlawful act in a state, as well as federal, criminal proceeding. *Rea v. United States*, 76 Sup. Ct. 292 (1956).[6]

In most jurisdictions it has long been established that the admissibility of evidence is not affected by the illegality of the means through which it was obtained.[7] In

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[1] 26 U.S.C. § 2593 (a) (1952).

[2] Rea moved to suppress the evidence under Rule 41 (e) of the Federal Rules of Criminal Procedure on the ground that the search warrant was improperly issued under Rule 41 (c) in that it was insufficient on its face, no probable cause existed, and the affidavit was based on unsworn statements.

[3] The marihuana involved was seized under Int. Rev. Code of 1939, § 2593 (a), 53 STAT. 281 (now INT. REV. CODE OF 1954, § 4744), and hence was "deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." 28 U.S.C. § 2463 (1952).

[4] Rea v. United States, 218 F.2d 237 (10th Cir. 1954).

[5] 76 Sup. Ct. at 293.

[6] Justice Douglas delivered the opinion of the court. Justice Harlan, joined by Justices Reed, Burton and Minton, dissented, saying: "This holding so far departs from the concepts which have hitherto been considered to govern state and federal relationships in this area that I am constrained to dissent." 76 Sup. Ct. at 294.

[7] 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940). See Wolf v. Colorado, 338 U.S. 25, 33-39 (1948). Mississippi, however, is among the minority which refuses to admit illegally obtained evidence. Tucker v. State, 128 Miss. 211, 90 So. 845 (1922).

Wolf v. Colorado[8] the United States Supreme Court held that in a prosecution in a state court for a state crime fourteenth amendment due process does not require the exclusion of evidence obtained by unreasonable search and seizure. In *Weeks v. United States*[9] the Supreme Court held that in a federal prosecution the fourth amendment bars the use of evidence obtained by a federal officer by unreasonable search and seizure. In 1951 the problem of balancing state interests under the *Wolf* doctrine and federal interests under the *Weeks* doctrine came before the Supreme Court in *Stefanelli v. Minard*,[10] where it was held that federal courts should not intervene in state criminal proceedings to suppress evidence even when secured by unlawful search and seizure. *Douglas v. Jeannette*[11] held that a federal district court, in the exercise of its discretion as a court of equity, should refuse to interfere with or embarrass threatened criminal proceedings in state courts by injunction, except in those *exceptional* cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent. *Boske v. Comingore*[12] held that a court of the United States in an *urgent* case may, by writ of habeas corpus, discharge a prisoner held in custody under state authority for an act done or omitted to be done in pursuance of a law of the United States or of an order, process, or decree of a court or judge thereof. *Wise v. Henkel*[13] held that a federal district court has inherent authority to correct abuse of its process and therefore has the power to order a federal officer to return books and papers seized pursuant to the court's warrant when the seizure represents an "unreasonable exertion of the process of the court." In

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[8]338 U.S. 25 (1948). This holding was reaffirmed in Irvine v. California, 347 U.S. 128 (1954).

[9]232 U.S. 383 (1914). The federal rule announced in *Weeks* has been criticized severely as an impediment to the courts' search for truth, see 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940), and various exceptions to it have been created. In Burdeau v. McCowell, 256 U.S. 464 (1921), the Supreme Court held that a federal prosecutor might make such use as he pleased of documents or other information acquired from a trespasser, if persons other than federal officers were guilty of the trespass. Federal courts also have tended to impose limitations on the federal rule's later development. See Park v. United States, 294 Fed. 776 (1st Cir. 1924); Boyd v. United States, 285 Fed. 930 (4th Cir. 1923); Kanellos v. United States, 282 Fed. 461 (4th Cir. 1922). In Commonwealth v. Colpo, 98 Pa. Super. 460, *cert. denied*, 282 U.S. 863 (1930), a federal officer was allowed to testify as to illegally obtained evidence in a state proceeding. The *Weeks* doctrine was reaffirmed in United States v. Jeffers, 342 U.S. 48 (1951). In Walder v. United States, 347 U.S. 62 (1954), the Supreme Court explained the federal exclusionary rule as having been adopted because convictions based on the use of unlawfully acquired evidence tend to "encourage the kind of society that is obnoxious to free men."

[10]342 U.S. 117 (1951), where a defendant in a forthcoming state criminal trial sought an injunction in a federal court under the Civil Rights Act to prevent the admission in a state court of evidence obtained by an unlawful search by state police. Reaffirming the *Wolf* doctrine, the Supreme Court denied relief. Speaking of the matter of competing federal and state interests, the Court pointed out that its concern in preserving the adjustment between federal equitable power and state administration of its own law "has received striking confirmation even where an important countervailing federal interest was involved. Maryland v. Soper (No. 1), 270 U.S. 9; Maryland v. Soper (No. 2), 270 U.S. 36; Maryland v. Soper (No. 3), 270 U.S. 44 [1925]." 342 U.S. at 121. Justice Douglas dissented on the ground that the exclusion of evidence obtained by an unreasonable search and seizure is required by the Federal Constitution in both state and federal prosecutions. He had previously expressed this view, together with Justices Murphy and Rutledge, in Wolf v. Colorado, 338 U.S. 25 (1926).

[11]319 U.S. 157 (1942).

[12]177 U.S. 459 (1899).

[13]220 U.S. 556 (1911).

McNabb v. United States[14] the question of the Supreme Court's "supervisory powers" arose, and the Court held that the scope of its reviewing power over convictions in federal courts is not confined to ascertainment of constitutional validity, but that "judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."[15]

It is submitted that the holding of the principal case logically could have been reached only in one of two ways: by invoking the Supreme Court's "supervisory powers over federal law enforcement agencies" as in *McNabb,* or by overruling *Wolf v. Colorado* and holding that the Constitution forbids the admission of evidence obtained by unreasonable search and seizure in a state, as well as federal, criminal case.[16] The Supreme Court chose the first of these alternatives to avoid determining a constitutional question, and in so doing moved one step closer to the second alternative. That the Supreme Court has supervisory powers over federal courts, though not over state courts, was made clear in *McNabb*; hence the court under those powers could justifiably determine whether it was an abuse of discretion on the part of the district court to withhold the relief sought by Rea.[17] While it is perhaps true that the principal

[14]318 U.S. 332 (1942). Here the Court in the exercise of its supervisory powers was primarily concerned with the failure of a federal trial court to entertain a motion for the exclusion of evidence obtained by excessively prolonged questioning of the defendants and to hold a hearing to determine whether such motion should be granted or denied.

[15]318 U.S. at 340.

[16]The petitioner advocated two alternatives before the Supreme Court. His first proposition was that "the fourth amendment bars the admission of evidence obtained by an illegal search and seizure of the federal government in state, as well as in federal, prosecutions." Brief for the Petitioner, p. 9, Rea v. United States, 76 Sup. Ct. 292 (1956). Petitioner's second, alternative proposition was that "the district court was obliged to redress the constitutional wrong done to the petitioner by an abuse of the court's own process." Brief for the Petitioner, p. 25, *supra.*

[17]The legal principles underlying the holding of the principal case are not clearly defined. McNabb v. United States, 318 U.S. 332 (1942), and Wise v. Henkel, 220 U.S. 556 (1911), are the key to full understanding of the Court's reasoning. The first step in the Court's analysis was that it could determine the case under its "supervisory powers" over the federal district *court* in accordance with *McNabb*, without considering the constitutional question tendered by petitioner's first proposition. *McNabb,* however, would appear to be doubtful authority in the instant case, for in *McNabb* there was no question of competing state and federal interests. Nevertheless, after invoking its supervisory powers, the Court's next step was the determination, under Wise v. Henkel, *supra,* that the district court had an "inherent authority" to correct the abuse of its process by granting the relief sought by Rea—*i.e., complete* suppression of the evidence obtained under the void federal warrant which issued from the district court. In *Henkel,* as in *McNabb,* there was no question of competing state and federal interests. Further, the books and papers the court ordered returned to their owner were not contraband, unlike the marihuana in the instant case. Still, once the Supreme Court in the principal case determined that the district court had the *power* to grant the relief sought by Rea, the next question was whether it was an abuse of discretion to withhold it. The Court answered this question affirmatively, holding that the district court had a *duty* to enforce the federal rules which had been violated by enjoining the federal agent from using the fruits of his unlawful act either in federal or state proceedings. The federal rules governing searches and seizures, said the Court, "are designed to protect the privacy of the citizen. . . . That policy [of protecting the citizen] is defeated if the federal agent can flout [the rules] and use the fruits of his unlawful act either in federal or state proceedings." 76 Sup. Ct. at 294. This policy consideration is well expressed in Shinyu Noro v. United States, 148 F.2d 696 (5th Cir. 1945): "[I]t is a federal judicial policy not to allow the agents and officers of the United States to break the law themselves and then use information so acquired to prosecute others." The soundness of this policy as applied to federal courts is not questioned here; the soundness of applying it where it will impinge on state criminal proceedings is questioned.

case has, in effect, expanded the *Weeks* doctrine,[18] the more pressing consideration here is the effect of this holding on the maintenance of the delicate balance between state and federal judicial systems. The Supreme Court addressed itself to this problem in *Stefanelli v. Minard*,[19] and held in a well-reasoned opinion that the federal courts should refuse to intervene in state criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. That the holding of the principal case has eaten into this sound doctrine will hardly be denied, even though the Court distinguished *Stefanelli* by saying: "The District Court in the instant case is not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law."[20] As pointed out by Justice Harlan in the dissenting opinion, this seems to be illusory.[21] The effect of granting the injunction is to make it impossible for the state to prosecute its action against Rea, which, obviously, was Rea's purpose in seeking the injunction. It should be apparent that "such an order would constitute an interference with the state judicial process."[22] While the claim may be made that the holding of the instant case is defensible on technical grounds, it represents a departure from the policy of maintaining an equilibrium between the federal and state governments in law enforcement. If the Court now feels that due process requires the exclusion in state courts of evidence obtained by unreasonable search and seizure, the issue should be met squarely at the first opportunity. A reversal of *Wolf v. Colorado* would perhaps be less damaging to the operation of state judicial process than the instant holding which requires the federal courts to interfere with and embarrass state procedures which were declared constitutional in the *Wolf* case. Conceding that the effect of the holding is limited, presumably, to the situation where the delinquent officer is a federal officer, still this is a step in the wrong direction. If there is to be a coordinate system of courts, the constitutional exercise of state judicial process must not be interfered with either directly or indirectly.

Clyde E. Bracken, Jr.

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[18]The underlying problem of the *Weeks* doctrine—that of striking a balance between the social need that crime be repressed and the social need that "law shall not be flouted by the insolence of office"—has been extensively explored by courts and by legal writers. See People v. Defore, 242 N.Y. 413, 150 N.E. 585 (1926); 8 WIGMORE, EVIDENCE §§ 2183, 2184 (3d ed. 1940).

[19]342 U.S. 117 (1951). Undeniably, the principal case is distinguishable from *Stefanelli*, where the tainted evidence was obtained by state, rather than federal, officers. Nevertheless, the excellent reasoning of *Stefanelli* applies with equal force to the principal case, as was recognized by the Court of Appeals for the Tenth Circuit. In *Stefanelli* the Court pointed out: "The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue." 342 U.S. at 120. Explaining their refusal to grant the relief sought by the petitioner, the Court said: "The consequences of exercising the equitable power here involved are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State Courts by resort to the federal forum, with review if need be to this court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts." 342 U.S. at 123.

[20]76 Sup. Ct. at 294.

[21]76 Sup. Ct. at 295.

[22]Rea v. United States, 218 F.2d 237, 240 (10th Cir. 1954).

JOINT ADVENTURES—RELATIONSHIP OF THE PARTIES

McCartney and McKendrick entered into an oral agreement to drill as joint adventurers two test wells in Jefferson County, Mississippi. All the transactions were to be conducted in McKendrick's name on behalf of the two. Arrangements were made with Cashion for the drilling of one of the wells.[1] Cashion was to receive fifty per cent of the profits from the adventure. McKendrick and McCartney were to divide the other fifty per cent equally. The two agreed with Cashion in February, 1950, to help secure finances for the well. Between March 15 and April 29, 1950, McKendrick called on McCartney to put up $2,500 cash and a "myself" note for $7,500, claiming that he was having to do the same. In truth, McKendrick did not have to put up that amount. McCartney told McKendrick to "count him out of it." On April 29, 1950, McKendrick entered into another agreement with Cashion to which McCartney was not a party.[2] As a result of this agreement McKendrick later obtained considerable profits.[3] The present suit is by McCartney to have himself declared one-half owner in the well and leases awarded to McKendrick. HELD: The profits obtained by McKendrick inured to the benefit of McCartney since there is a fiduciary relationship between the parties to a joint adventure and abandonment was not clearly established. *McCartney v. McKendrick,* 85 So.2d 164 (Miss. 1956).

There have been only a few cases decided in Mississippi on the subject of joint adventures. The leading Mississippi case concerning the nature of the relationship and the mutual obligations of the parties is *Sample v. Romine.*[4] In the *Sample* case and in the decisions in other jurisdictions a joint adventure has been defined as an association of two or more persons to carry out a single business enterprise for profit.[5] It is generally held that the law of partnerships applies to joint adventures.[6] The joint adventure is a relationship arising ex contractu and not by law;[7] however, it is not necessary that the contract be express—it may be implied from the conduct of the

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[1]Cashion, president of Lyle Cashion Company, was to drill the shallow test well; Kemp Drilling Company was to drill the deep test well.

[2]The agreement contained a provision that either of the parties would have an option to purchase one-half of the leases, royalty, etc., acquired by the other within a ten-mile radius of the test well. McKendrick and Cashion each were to bear one-half of the cost of drilling the test well. McCartney was not informed of this agreement.

[3]The original test well proved dry but as a result of information obtained from it and the deep test, the discovery well of Churchill Field, Jefferson County, was drilled by Cashion. Cashion then filed suit against McKendrick for a judgment declaring that McKendrick had no interest in the well and surrounding leases acquired by Cashion. McKendrick was declared to be one-half owner in the well and leases. Lyle Cashion Co. v. McKendrick, 97 F. Supp. 1008 (E.D. La. 1951).

[4]193 Miss. 706, 8 So.2d 257, *suggestion of error overruled,* 9 So.2d 643, *corrected on other grounds,* 10 So.2d 346 (1942).

[5]Great Atl. & Pac. Tea Co. v. Gilley, 28 Ala. App. 360, 184 So. 286 (1938); Swan v. Ispas, 325 Mich. 39, 37 N.W.2d 704 (1949); Scott v. Kempland, 264 S.W.2d 349 (Mo. 1954); Alexander v. Turner, 139 Neb. 364, 297 N.W. 589 (1941). See annots., 48 A.L.R. 1055 (1926), 63 A.L.R. 909 (1928), 138 A.L.R. 968 (1941).

[6]George W. Haxton & Son v. Rich, 47 N.Y.S.2d 501 (1944); Preston v. State Industrial Acc. Comm'n, 147 Ore. 553, 149 P.2d 957 (1944); Mechem, *The Law of Joint Adventures,* 15 MINN. L. REV. 644 (1931). Mechem maintains that there is no difference in the law pertaining to joint adventures and that pertaining to partnerships.

[7]Porter v. Cooke, 127 F.2d 853 (5th Cir. 1942), *cert. denied,* 317 U.S. 670 (1942), *rehearing denied,* 317 U.S. 710 (1942); Coral Gables Securities Corp. v. Miami Corp., 123 Fla. 172, 166 So. 555 (1936); Brown v. Wood, 293 Mich. 148, 291 N.W. 255 (1940); Arnold v. DeBooy, 161 Minn. 255, 201 N.W. 437 (1924); Soulek v. Omaha, 140 Neb. 151, 299 N.W. 368 (1941).

parties.[8] The relationship between joint adventurers is fiduciary in character and each party owes to the other the utmost good faith[9] and honesty[10] in all that relates to their common interest. They stand in the same fiduciary relationship to one another as do partners.[11] Each must fully disclose to the other everything that concerns the joint adventure;[12] therefore, neither of the parties will be allowed to gain advantage over the other by means of secret agreements in connection with the enterprise.[13] Each of the members of the joint adventure is entitled to his proportionate share of any profits that arise from such secret agreements.[14] In order to establish the defense of abandonment of the adventure, there must be clear, decisive and unequivocal evidence of the abandonment.[15]

The application in the noted case of the rule that joint adventurers will not be allowed to take advantage of one another in connection with the enterprise is in accord with the rules of fiduciary relationships. The failure of McKendrick to make a full disclosure of all the information obtained from the test wells, his failure to disclose the ten-mile radius clause of the subsequent agreement, and his request for funds were breaches of his duty to McCartney. The court rightly refused to permit him to profit thereby.

Shannon Clark

LABOR LAW—HARASSING TACTICS DURING NEGOTIATIONS AS EVIDENCE OF UNION'S REFUSAL TO BARGAIN IN GOOD FAITH

The union commenced negotiations for a new contract with the company two weeks prior to the expiration of an existing contract. After three months of bargaining, during which there was neither a strike nor an agreement, the union, while con-

[8]Thompkins v. Collector, 97 F.2d 396 (4th Cir. 1938); Dolan v. Dolan, 107 Conn. 342, 104 Atl. 745 (1928); Bennett v. Sinclair Refining Co., 144 Ohio St. 139, 57 N.E.2d 776 (1944); O.K. Boiler & Welding Co. v. Minnetonka Lumber Co., 103 Okla. 226, 229 Pac. 1045 (1924).

[9]Murray v. Williams, 114 F.2d 282 (4th Cir. 1940); Van Heuvel v. Roberts, 221 Ala. 83, 127 So. 506 (1930); Walls v. Gribble, 168 Ore. 542, 124 P.2d 713 (1942).

[10]"Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arms length, are forbidden by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." Cardozo, J., in Meinhard v. Salmon, 249 N.Y. 858, 164 N.E. 545 (1928).

[11]Austin v. Hallmark Oil Co., 125 P.2d 935 (Cal. App. 1942); Johnson v. Peckham, 132 Tex. 148, 120 S.W.2d 786 (1938).

[12]In re Gotfried, 45 F. Supp. 939 (S.D. Cal. 1942); Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 128 P.2d 665 (1942).

[13]Menefee v. Oxnam, 42 Cal. App. 81, 183 Pac. 379 (1919); Harm v. Boatman, 128 Wash. 202, 222 Pac. 478 (1924); Goldman v. Cosgrove, 172 Wis. 462, 179 N.W. 673 (1920).

[14]Air Purification, Inc. v. Carle, 99 Cal. App. 2d 258, 221 P.2d 700 (1950); Meinhard v. Salmon, 249 N.Y. 858, 164 N.E. 545 (1928). See annot., 62 A.L.R. 13 (1928).

[15]Only one case other than the noted case was found where this rule was used in regard to joint adventures, McIver v. Norman, 187 Ore. 516, 213 P.2d 144 (1949), but it has been used in other types of cases. Board of Supervisors v. Newell, 213 Miss. 274, 56 So.2d 689 (1952) (abandonment of land for school purposes as breach of a condition subsequent in a deed); First Nat'l Bank v. Maxwell, 123 Cal. 360, 55 Pac. 980 (1899) (Creditor, with knowledge of a prior fraudulent conveyance of the debtor, accepted from the debtor a mortgage upon other property covering the amount of the indebtedness. Such conduct did not constitute a waiver of his right to attach such conveyance.)

tinuing to bargain, introduced certain pressure tactics: concerted slowdowns, walk-outs, refusals to work overtime, extensions of rest periods and meetings on the company's time. The company filed charges of unfair labor practices with the National Labor Relations Board. The tactics continued, and nine months after their commencement the negotiations reached an impasse. The Board found that the union's tactics evidenced a failure to bargain in good faith and ordered the union to cease the tactics during negotiations.[1] On petition for review and cross-petition for enforcement, enforcement was denied. HELD: The union's harassing tactics during negotiations were not evidence that it had not bargained in good faith and the practices could not be enjoined as violations of the union's duty to bargain in good faith.[2] *Textile Workers Union, CIO v. NLRB,* 227 F.2d 409 (D.C. Cir. 1955).

A labor organization, like an employer, is required to bargain collectively[3] in good faith.[4] Ordinarily, cases in which a union is alleged to have refused to bargain involve the illegality of some objective sought by the union such as the continuance of a hiring-hall;[5] the granting by the employer of a closed shop;[6] the abrogation by the employer of an existing contract with a rival certified union;[7] the refusal by the union to enter into a contract or to reduce any agreement to writing;[8] the demand that an employer post bond as a condition precedent to the settlement of a strike.[9] The Supreme Court has held that the duty to bargain is enforced by application of the good faith bargaining standards which the act sets forth to the facts of each case.[10] Good faith bargaining has been construed to mean bargaining with a sincere intent to reach an agreement.[11] In determining whether there has been evasion or fulfillment of the duty to bargain in good faith, the Board views the evidence of each case as a whole.[12] Where the evidence evinces a mind closed to persuasion and without a sincere purpose to find a basis of agreement, the Board and the courts have found such an attitude on the part of employers to be incompatible with good faith bargaining.[13] In the instant case, the employer was not informed of any specific demands

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[1]Textile Workers Union, CIO, 108 N.L.R.B. 743 (1954).

[2]Danaher, J., dissented. The court also ruled that the union unlawfully coerced employees when it threatened reprisals against those who worked overtime or who gave testimony in an NLRB proceeding and when it blocked plant entrances, but that such conduct did not constitute an unlawful refusal to bargain.

[3]61 STAT. 141 (1947), 29 U.S.C. § 158 (b) (3) (1952).

[4]61 STAT. 142 (1947), 29 U.S.C. § 158 (d) (1952).

[5]National Maritime Union, 78 N.L.R.B. 971, *enforcement granted,* 175 F.2d 686 (2d Cir. 1949), *cert. denied,* 338 U.S. 955 (1949); American Radio Ass'n, 82 N.L.R.B. 1344 (1949); National Maritime Union, 82 N.L.R.B. 1365 (1949).

[6]Essex County and Vicinity District Council of Carpenters, AFL, 95 N.L.R.B. 969 (1951); The Great Atl. and Pac. Tea Co., 81 N.L.R.B. 1052 (1949).

[7]The Perry Norvell Co., 80 N.L.R.B. 225 (1948).

[8]Chicago Typographical Union, 86 N.L.R.B. 1041, *enforcement granted,* 193 F.2d 782 (7th Cir. 1951), *aff'd,* 345 U.S. 100 (1952); Union Employers Sec. of Printing Industry, 87 N.L.R.B. 1418 (1949), *enforcement granted,* 193 F.2d 782 (7th Cir. 1951); Graphic Arts League of Baltimore, 87 N.L.R.B. 1215 (1949). *Contra,* American Newspaper Publishers Ass'n, 86 N.L.R.B. 951, *enforcement granted,* 193 F.2d 782 (7th Cir. 1951).

[9]International Brotherhood of Teamsters, Local 294, AFL, 87 N.L.R.B. 972 (1949).

[10]American Nat'l Ins. Co., 343 U.S. 395 (1951).

[11]J. W. Woodruff, 90 N.L.R.B. 808 (1950), *enforcement granted,* 193 F.2d 641 (5th Cir. 1952); Gay Paree Undergarment Co., 91 N.L.R.B. 1363 (1950); Montgomery Ward & Co., 90 N.L.R.B. 1244 (1950).

[12]Textile Workers Union, CIO, 108 N.L.R.B. 743 (1954); Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952).

[13]Reed and Prince Mfg. Co., 12 N.L.R.B. 944, *enforcement granted,* 118 F.2d 874 (1st Cir. 1941), *cert. denied,* 313 U.S. 595 (1941); Globe Cotton Mills, 6 N.L.R.B. 461 (1938), *enforcement granted,* 103 F.2d 91 (5th Cir. 1939); Whittier Mills Co., 3 N.L.R.B. 389 (1937), *enforcement granted,* 111 F.2d 474 (5th Cir. 1940).

which these tactics were designed to enforce nor what concessions it could make to avoid them.[14] The Board has characterized the use of unprotected harassing tactics during negotiations as an abuse of the union's bargaining powers "irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good-faith bargaining must rest."[15] However, in *Local 232, UAW, AFL v. Wisconsin Employment Relations Board* the Supreme Court held that conduct of the type here described "is not forbidden by the Act and no proceeding is authorized by which the Federal Board may deal with it in any manner."[16]

Thus, under the Supreme Court ruling in the *UAW* case as interpreted in the instant case the union's unprotected harassing tactics during negotiations cannot be considered in determining whether there was good faith bargaining because the conduct was not prohibited and, therefore, not cognizable by the Board.[17] But the Court was not there concerned with the question whether such conduct may constitute evidence of a lack of good faith bargaining, but with whether state regulation prohibiting partial strikes was permissible.[18] For this reason, the Board, in reaching its decision in the instant case,[19] regarded as dictum the language of the Court in the *UAW* case relating to the Board's lack of authority in dealing with the union's tactics. The act provides that the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.[20] Therefore, the better view would appear to be that a union's failure to bargain in good faith may be evidenced not only by its insistence on illegal objectives, but also by its use of unprotected[21] tactics during negotiations.

William Owen Mayfield

LIENS—JUDGMENT LIENS—EFFECT OF EXECUTION UPON PRIORITY

Defendant obtained and duly enrolled a judgment against one Breland in Perry County, Mississippi. Subsequently Breland became the owner of a truck, obtained a loan on it from plaintiff in Monroe, Louisiana, and to secure the indebtedness executed to plaintiff a chattel mortgage on the truck, also properly recorded in Perry County. Thereafter defendant had execution issued on the enrolled judgment and the truck was seized. HELD: By virtue of the execution, the judgment lien was perfected as of the date of the acquisition of the truck and is therefore superior to the chattel mortgage. *Motor Securities Co. v. B.M. Stevens Co.*, 83 So.2d 177 (Miss. 1956).

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[14]Textile Workers Union, CIO, 108 N.L.R.B. 743 (1954).
[15]Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952).
[16]336 U.S. 245 (1949), *rehearing denied*, 336 U.S. 970 (1949).
[17]Local 232, UAW, AFL v. Wisconsin Employment Relations Board, *supra* note 16.
[18]Local 232, UAW, AFL v. Wisconsin Employment Relations Board, *supra* note 16.
[19]Textile Workers Union, CIO, 108 N.L.R.B. 743 (1954).
[20]61 STAT. 148 (1947), 29 U.S.C. § 160(e) (1951).
[21]United Construction Workers, UMW v. Laburnum Construction Corp., 347 U.S. 656, 666 (1954); Garner v. Teamsters Union, CIO, 346 U.S. 485, 490 (1953); NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1952); Local 232, UAW, AFL v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949); NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939); NLRB v. Mac Smith Garment Co., 219 F.2d 469, 470, 471 (5th Cir. 1955); The Hoover Co. v. NLRB, 191 F.2d 380 (6th Cir. 1951); Home Beneficial Life Ins. Co. v. NLRB, 159 F.2d 280 (4th Cir. 1947); Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952); Gulf Coast Oil Co., 97 N.L.R.B. 1513 (1952); Local 1229, Electrical Workers, AFL, 94 N.L.R.B. 1507, *rev'd*, 202 F.2d 186 (D.C. Cir. 1952), *rev'd*, 346 U.S. 464 (1953); International Shoe Co., 93 N.L.R.B. 907 (1951); Elk Lumber Co., 91 N.L.R.B. 333 (1950); Super-Cold Southwest Co., 81 N.L.R.B. 96 (1949), *enforcement granted*, 180 F.2d 581 (5th Cir. 1950); American News Co., 55 N.L.R.B. 1302 (1944).

At common law an enrolled judgment gave the creditor no lien upon real property of the debtor,[1] but today the rule has been changed by statute in most states.[2] With one or two exceptions,[3] however, the lien has never been extended to the debtor's personal property,[4] which may be alienated freely prior to levy of execution,[5] or delivery of the writ of execution to the sheriff,[6] the purchaser's title being unaffected by the enrolled judgment itself.[7] The Mississippi statute[8] provides that a judgment properly enrolled[9] ". . . shall be a lien upon and bind *all* the property of the defendant within the county where so enrolled, from the rendition thereof, and shall have priority according to the order of such enrollment, in favor of the judgment creditor, his representatives or assigns, against the judgment debtor, and all persons claiming the property under him after the rendition of the judgment. . . ." (Emphasis added.) The provision applies to personalty as well as realty[10] and the lien has been held to attach to after-acquired property from the date of its acquisition.[11] Prior to *Willis Hardware Co. v. Clark*,[12] the judgment roll was considered constructive notice of the judgment creditor's lien on goods purchased from the judgment debtor[13] and the purchaser's title was deemed subject to the creditor's right to have them seized under a writ of execution for the satisfaction of the judgment.[14] The *Willis* case, however, in holding a purchaser of the judgment debtor's goods not liable to the judgment creditor for the conversion thereof, made it clear that the statutory lien on personal property was only a general one which was not perfected until actual seizure by execution.[15]

The *Willis* decision could easily have left the impression that Mississippi has directly contravened its statute and adopted the majority view that, as to personal

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[1] 2 FREEMAN, JUDGMENTS § 916 (5th ed. 1925).

[2] TIEDEMAN, REAL PROPERTY § 529 (3d ed. 1906).

[3] *E.g.*, ALA. CODE ANN. tit. 7, § 585 (1940) provides that "every judgment or decree . . . shall be a lien in the county where filed, on all property of the defendant, which is subject to levy and sale under execution. . . ."

[4] 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 22 (rev. ed. 1940).

[5] City Fuel Co. v. Nichols Roofing Co., 207 Iowa 860, 223 N.W. 751 (1929); Rush v. First Nat'l Bank, 324 Pa. 285, 188 Atl. 164 (1936).

[6] VA. CODE ANN. § 8-411 (1950) provides that the "writ of fieri facias may be levied . . . on the goods and chattels of the judgment debtor, except such as are exempt from levy . . . and shall bind what is capable of being levied on only from the time it is delivered to the officer to be executed."

[7] Brown v. Deal, 256 S.W. 114 (Mo. 1923).

[8] MISS. CODE ANN. § 1555 (1942).

[9] MISS. CODE ANN. § 1554 (1942) provides that the circuit clerk shall procure and keep in his office a book to be styled "The Judgment Roll" and that all judgments shall be entered therein within twenty days after the adjournment of each term of court.

[10] "The term 'property,' when used in any statute, includes personal property . . . and also every estate, interest, and right, in lands, tenements and hereditaments." MISS. CODE ANN. § 692 (1942).

[11] Cooper v. Turnage, 52 Miss. 431 (1876); Cayce v. Stovall, 50 Miss. 396 (1874); Jenkins v. Gowen, 37 Miss. 444 (1859).

[12] 216 Miss. 84, 61 So.2d 441 (1952).

[13] Gerlach-Barklow Co. v. Ellet, 145 Miss. 60, 111 So. 92 (1927); Josselyn v. Stone, 28 Miss. 753 (1855); Phillips v. Lane, 4 How. 122 (Miss. 1839).

[14] Gerlach-Barklow Co. v. Ellet, *supra* note 13; Minshew v. Davidson, 86 Miss. 354, 38 So. 315 (1905); Jenkins v. Gowen, 37 Miss. 444 (1859).

[15] "It confers a mere right of satisfaction out of any property of the defendant then held or subsequently acquired. . . . [B]ut this right depends upon the fact that the property shall be actually taken in execution; and if that is never done, the creditor's claim is nothing more than a debt of record, and a purchaser for a valuable consideration would be entitled to hold property purchased from the defendant subsequent to the date of the judgment." 216 Miss. at 94, 61 So.2d at 442.

property, the enrolled judgment *itself* is of no effect whatever,[16] and that the effective date of the lien is the date of execution. But that conclusion is clearly refuted by the instant case. It shows that the enrollment of the judgment is far from useless, for thereby the creditor acquires the right to perfect his lien at any time in the future as of the date of the enrollment by the process of execution. By strict compliance with the statute,[17] a judgment creditor protects himself against subsequent purchasers from the debtor so long as he does not allow the property to get beyond the power of execution. Notwithstanding the court's continued departure from the literal wording of the statute, this case clarifies its meaning and removes the uncertainty created by the *Willis* case on the subject of judgment liens. Judgment creditors should now have a clear picture of their rights and duties under section 1555.

H. Nolen Fancher

OIL AND GAS—ASSIGNMENT OF LEASE BY QUITCLAIM DEED

In 1944 Creagh and wife executed an oil, gas and mineral lease containing the usual warranties, one-eighth royalty reservation to lessor, and proportionate reduction clause. Complainant Whitten became holder of the lease by mesne conveyances, and in July, 1952, for a consideration of ten dollars did "sell, transfer, set over and assign to Stanley and Daws [defendants] said oil, gas and mineral lease, together with all rights and privileges accorded under said lease." Complainant excepted a royalty interest equal to one-sixteenth of one-eighth of production. Either during drilling operations or after production defendants discovered outstanding interests in the land not owned by Creagh, the lessor, which they purchased for a sufficient consideration. There was a conflict in testimony as to the transactions between the parties before the assignment and whether complainant knew of these outstanding interests.[1] Complainant's bill, which alleged that a fiduciary relationship arose through the assignment entitling him to royalty payments from the outstanding interests, was dismissed by the Chancery Court of Wayne County. HELD: Although the lease itself contained warranty of title, the assignment was effective only to pass assignor's interest as a quitclaim and release, and estopped assignor from asserting subsequently acquired title. Therefore, the assignees, when they discovered that full title did not pass under the assignment, could acquire the outstanding interests for themselves without fiduciary obligation to allow assignor to acquire the interests or to pay him

[16]Indeed, Justice Roberds in his dissenting opinion complained that "the entire right of the judgment creditor being dependent alone upon seizure under execution, enrollment of the judgment is useless, for execution can issue on an unenrolled judgment as effectually as upon one enrolled." 216 Miss. at 94, 61 So.2d at 443.

[17]MISS. CODE ANN. § 1555 (1942).

[1]Complainant claimed that he approached Daws about drilling some years before the assignment, since the lease was getting old; that he did have title checked but his lawyer did not tell him, nor did he know, of the outstanding interests. Daws testified that complainant had begged him for two years to take the lease; that he had given appellant $147.50 to pay the delay rentals; that he was not obligated to check title; and that there was no fiduciary relationship between the parties. The chancellor expressed doubt as to the formation of any agreement relating to the obligation to check title.

overriding royalty for the outstanding interests.[2] *Whitten v. Daws*, 83 So.2d 744 (Miss. 1955).[3]

Until brought to the surface and reduced to possession oil and gas in place constitute an interest in realty, a corporeal hereditament susceptible to ownership separate from the surface.[4] As such it may be conveyed by deed[5] or lease,[6] and a lessee's interest may be transferred in whole or in part by sublease[7] or assignment,[8] in the absence of express provision in the lease or statutory prohibition.[9] As it is a conveyance of an interest in realty an assignment must meet the formal requirements of other instruments of conveyance.[10] It is universally held that an assignment is subject to the recordation statutes.[11] Because of the privity of estate arising from the assignment, the courts have uniformly applied the rules of law applicable to "covenants running with the land" in regard to the assignee's duty to the *lessor* to perform all the

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[2]As a further ground for denying relief the court pointed to the small consideration, the age of the lease, and the fact that "assignees were required to drill in an unproven field within ninety days and assume hazard of large expenditure." 83 So.2d at 746.

[3]Kyle, J., with whom McGehee, C.J., and Arrington, J., concurred, dissented, advancing three theories for allowing recovery. First, that the assignment was an executory contract, and that a purchaser in possession under it could not purchase an outstanding title and assert it against his vendor while remaining in possession, Harkreader v. Clayton, 56 Miss. 383 (1879); second, that there was a fiduciary relationship created by the assignment and surrounding transactions, Trice v. Comstock, 121 Fed. 620, 61 L.R.A. 176 (8th Cir. 1903); and third, that a constructive trust arose, protecting assignor from assignee's inequitable conduct, even though there was no fiduciary relationship, Kennedy v. Seaboard Oil Co., 99 F. Supp. 730 (N.D. Cal. 1951).

[4]Gulf Refining Co. v. Stanford, 202 Miss. 602, 30 So.2d 516, 173 A.L.R. 1099 (1947); Merrill Engineering Co. v. Capital Nat. Bank, 192 Miss. 378, 5 So.2d 666 (1941); Pace v. State *ex rel.* Rice, 191 Miss. 780, 4 So.2d 270 (1941); Stern v. Great So. Land Co., 148 Miss. 649, 114 So. 739 (1927).

[5]Hudson v. Newell, 172 F.2d 848 (5th Cir. 1949); Silver v. Upton, 202 Miss. 485, 32 So.2d 267 (1947); Allen v. Boykin, 199 Miss. 417, 24 So.2d 748 (1945).

[6]Anderson v. Sun Oil Co., 207 Miss. 332, 32 So.2d 267 (1949); Palmer v. Crews, 203 Miss. 806, 35 So.2d 430, 2 A.L.R.2d 438 (1948). A lessee under a ten year primary term and "so long as" clause has an estate amounting to a determinable fee. Koenig v. Calcote, 199 Miss. 435, 25 So.2d 763 (1946).

[7]There are no Mississippi decisions distinguishing a sublease from an assignment. For the problem arising where such distinction is made, see Garner v. Knudsen, 277 P.2d 890 (Cal. App. 1954); Halbert v. Hendrix, 121 Ind. App. 43, 95 N.E.2d 221 (1951); Robertson v. Pioneer Gas Co., 173 La. 314, 137 So. 46 (1931); Hamblen v. Placid Oil Co., 279 S.W.2d 127 (Tex. Civ. App. 1955) (the first Texas case making the distinction). See GLASSMIRE, OIL AND GAS LEASES AND ROYALTIES § 86 (2d ed. 1938); Brown, *Assignments of Interests in Oil and Gas Leases, Farm-Out Agreements, Bottom Hole Letters, Reservations of Overrides and Oil Payments,* Southwestern Legal Foundation (Fifth Annual Institute of Oil and Gas Law and Taxation, 1954), at 25. For further discussion, see Moses, *Assignment and Sublease of Oil and Gas and Mineral Leases in Louisiana,* 23 TUL. L. REV. 231 (1948); Note, 23 MISS. L.J. 299 (1952).

[8]Griffith v. Gulf Refining Co., 215 Miss. 15, 60 So.2d 519 (1952); Cummings v. Midstates Oil Corp., 193 Miss. 675, 9 So.2d 648 (1942). See also Shaffer v. Marks, 241 Fed. 139 (D.C. 1917); Lawrence v. Mahoney, 145 Ark. 310, 225 S.W. 340 (1920); Chandler v. Hart, 161 Cal. 405, 119 Pac. 516 (1911); Sklar Oil Corp. v. Standard Oil Co., 189 La. 1049, 181 So. 487 (1938); Funk v. Hardeman, 53 Pa. 229 (1866).

[9]CAL. CORP. CODE § 25,000 (1941); M.G.N. Oil Co. v. Guiberson, 126 Cal. App. 2d 87, 217 P.2d 525 (1954).

[10]An assignment must be in writing, signed by the assignor, MISS. CODE ANN. §§ 264, 831, 832 (1942), Hamilton v. Morrison, 146 F.2d 533 (5th Cir. 1945); describe the land by reference to the lease, Cummings v. Midstates Oil Corp., 193 Miss. 675, 9 So.2d 648 (1942), Archer v. High, 193 Miss. 361, 9 So.2d 647 (1942); be acknowledged, MISS. CODE ANN. § 856 (1942); and be delivered to the assignee, Highes v. Franklin, 201 Miss. 215, 29 So.2d 79 (1946).

[11]MISS. CODE ANN. §§ 867, 869, 876-01 (1942). Section 876-01 impliedly recognizes recordation of an assignment of an oil and gas lease. But for an assignment by quit-

express and implied covenants of the lease, where the covenants "run with the land" and the time of performance occurs during the period of assignment.[12] At common law, after assignment the lessee remains obligated to the lessor.[13] Since no fiduciary duty arises from the mere act of assignment[14] the duties and obligations of assignees to their assignors are dependent on the terms of the instrument.[15] An assignment may or may not contain covenants for title;[16] if it does, the courts will find a fiduciary duty between assignor and assignee.[17] In Mississippi a conveyance without covenants operates as a quitclaim and release, passes only the grantor's "right, title and interest to the property in question,"[18] and carries with it none of the "usual covenants of the common law."[19] The doctrine of estoppel by deed operates in quitclaim deeds only by statute.[20] The grantee of a quitclaim deed may purchase outstanding interests,[21] for there is nothing on which to found a fiduciary relationship, such as privity of estate in warranty deeds[22] or mortgages.[23] After assignment by quitclaim deed the re-

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claim deed to have priority of record, it must have valuable, not nominal, consideration. Smith County Oil Co. v. Jefcoat, 203 Miss. 404, 33 So.2d 630 (1948). See Stevens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566 (1923), overruling National Pipeline Co. v. Teel, 95 Tex. 586, 68 S.W. 979 (1902); 3 SUMMERS, OIL AND GAS § 551 (2d ed. 1938).

[12]Gulf Refining Co. v. Griffith, 215 Miss. 15, 60 So.2d 525 (1952); White v. Hunt, 193 Miss. 742, 10 So.2d 539 (1942). 3 SUMMERS, OIL AND GAS § 553 (2d ed. 1938).

[13]See note 12 *supra*. This is another example of the courts' application of the rigid rules of real property law to oil and gas leases and assignments.

[14]Phillips Petroleum Co. v. McCormick, 211 F.2d 361 (10th Cir. 1954); Henry v. Gulf Refining Co., 179 Ark. 138, 15 S.W.2d 979 (1929); Wier v. Glassell, 216 La. 828, 44 So.2d 882 (1944); Robinson v. Eagle-Pitcher Lead Co., 132 Kan. 860, 297 Pac. 697, 75 A.L.R. 840 (1931); MacDonald v. Follett, 142 Tex. 616, 180 S.W.2d 334 (1944).

[15]Unless the instrument expressly provides that the override applies to renewals, modifications or extensions of the original lease, the courts refuse to find such a fiduciary relationship as to allow recovery by assignor when assignee has executed a subsequent, separate agreement with the original lessor. Cases denying recovery: Gordon v. Empire Gas & Fuel Co., 63 F.2d 487 (5th Cir. 1933); Henry v. Gulf Refining Co., *supra* note 14; Goocey v. Hopkins, 206 Ky. 176, 266 S.W. 1087 (1925); Wier v. Glassell, *supra* note 14; Shropshire v. Hammond, 120 S.W.2d 282 (Tex. Civ. App. 1938). Allowing recovery: Oldland v. Grey, 179 F.2d 408 (10th Cir. 1950); Kennedy v. Seaboard Oil Co., 99 F. Supp. 730 (D.C. Cal. 1951); Howell v. Cooperative Refinery Ass'n, 176 Kan. 572, 271 P.2d 271 (1954); Berman v. Brown, 224 La. 619, 70 So.2d 433 (1954); Wells v. Cuie, 19 Ohio App. 165 (1924); Probst v. Hughes, 143 Okla. 11, 286 Pac. 875, 69 A.L.R. 929 (1930); Bates v. Georgia Fertilizer Co., 144 Tenn. 32, 229 S.W. 153 (1920). See cases collected in annot., 69 A.L.R. at 936.

[16]As a lease is an interest in realty, it may be conveyed by any of the types of conveyances used to convey other interests in land. MISS. CODE ANN. §§ 843 (warranty deed), 844 (special warranty deed), 846 (quitclaim and release), and 847 (grant, bargain and sale) (1942).

[17]"It is a well established general rule that, where a purchaser has been put in possession, he cannot afterwards acquire a title and set it up in opposition to the vendor. If he extinguish an incumbrance, or buy in an outstanding title, all he can ask or require is the repayment of the money he so paid out." Hardeman v. Cowan, 10 Miss. (18 S. & M.) 486 (1848). See also Wade v. Barlow, 99 Miss. 33, 54 So. 662 (1910). In the instant case the court indicated that although the fiduciary relationship as set forth in Trice v. Comstock, 121 Fed. 620, 61 L.R.A. 176 (8th Cir. 1903) and Risk v. Risher, 197 Miss. 155, 19 So.2d 484 (1944) would arise in conveyances with warranty, it would not in quitclaim conveyances.

[18]Chapman v. Sims, 53 Miss. 154 (1876). See MISS. CODE ANN. §§ 845, 846 (1942).

[19]Perkins v. White, 208 Miss. 157, 43 So.2d 897 (1949). See MISS. CODE ANN. § 846 (1942).

[20]MISS. CODE ANN. § 846 (1942); Myers v. American Oil Co., 192 Miss. 180, 5 So.2d 218 (1941).

[21]Perkins v. White, 208 Miss. 157, 43 So.2d 897 (1949).

[22]See note 17 *supra*.

[23]Martin v. Raleigh State Bank, 146 Miss. 1, 111 So. 448 (1927). See cases collected in 37 AM. JUR., *Mortgages* § 1163 (1938).

quired privity of estate exists only between lessor and lessee's assignee,[24] and in the majority of cases few, if any, questions of title arise.[25]

The instant case was decided under traditional principles of title law, and the decision is technically correct.[26] However, it is submitted that an assignment of an oil and gas lease should not be treated under the technical rules of land conveyancing. Oil and gas law is a relatively modern development, and lease assignments are a specialized part of this branch, looking forward not so much to the conveyance of an interest in realty as to the production of oil and gas for the profit of both parties. In this light, especially where the assignor retains an override, it is apparent that the assignor remains interested in the land to be explored. The very position of the courts in relation to other, non-titular covenants points this up.[27] However, until there is a change in the outlook of the courts on the question of covenants for title in lease assignments, it would be expedient for the assignor who wishes to retain an interest in the title to the leased land to follow the forms for "assignment with warranties" set forth in one of the current forms books.[28]

Douglas C. Wynn

TORTS—FEDERAL TORT CLAIMS ACT—LIABILITY FOR NEGLIGENT PERFORMANCE OF PURELY GOVERNMENTAL OPERATIONS

Action was brought by a barge charterer and others under the Federal Tort Claims Act[1] for the damage to a tug caused by the negligent operation of a lighthouse by the Coast Guard. The district court dismissed the complaint, the court of appeals affirmed,[2] and the Supreme Court granted certiorari. HELD: The United States was liable. *Indian Towing Company v. United States*, 76 Sup. Ct. 122 (1955).

The government contended that the operation of a lighthouse is a purely governmental operation or function[3] and that under the act, especially section 2674, there

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[24]See note 12 *supra*.

[25]3 SUMMERS, OIL AND GAS §§ 552, 554 (2d ed. 1938).

[26]See notes 17 and 21 *supra*.

[27]See note 12 *supra*.

[28]2 MORSE, MISSISSIPPI LEGAL FORMS ANNOTATED, pp. 1320-1321, 1342-1345 (2d ed. 1950); 7 SUMMERS, OIL AND GAS §§ 1929, 1930 (2d ed. 1938).

[1]The pertinent provisions of the act are: ". . .the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable . . . in accordance with the law of the place where the act . . . occurred." 28 U.S.C. § 1346 (b) (1946). "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674 (1946). "The provisions of this chapter and section 1346 (b) . . . shall not apply to any claim based upon an act or omission of an employee . . . exercising due care, in the execution of a statute or regulation . . . or based upon the exercise . . . or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused." 28 U.S.C. § 2680 (a) (1946).

[2]211 F.2d 886 (5th Cir. 1954). The court of appeals considered Dalehite v. United States, 346 U.S. 15 (1953), decisive.

[3]"No person, or public body . . . excluding the armed services shall establish . . . any aid to maritime navigation without first obtaining authority to do so from the Coast Guard. . . . Whoever violates the provisions of this section . . . shall be guilty of a misdemeanor. . . ." 14 U.S.C. § 83 (1949).

must be an analogous private liability in the general field of torts to hold the government responsible.[4] The lower federal courts have been in conflict as to this question.[5] Two Supreme Court decisions, *Feres v. United States*[6] and *Dalehite v. United States*[7] were believed by the government to be controlling in the instant case. The *Feres* case involved three suits by servicemen under the act for injuries sustained due to the negligence of other members of the military service. Although the Court spoke of "no analogous private liability,"[8] it appears that the case was decided for the government essentially because of the status of the litigants,[9] for the acts of negligence involved in that case[10] could be, and are, committed by private individuals. In the *Dalehite* case the government was relieved of liability for injuries caused by the explosion of ships under government control in Texas City harbor. The case was disposed of primarily on the ground that the determinations regarding loading the ships with inflammables, although highly improper, came within the discretionary function exemption of section 2680 (a).[11] However, there was another consideration involved. As to specific counts of Coast Guard negligence relating to firefighting *after* the explosion, the Court relied on the *Feres* case, stating, "here, as there, there is no analogous liability. . . . In fact, if anything is doctrinally sanctioned in the law of torts, it is the immunity of communities and other public bodies for injuries due to fighting fires."[12]

The Court in the instant opinion disposed of these two decisions by stating, in effect, that they were not controlling. Because of the status of the litigants in the *Feres* case, it is felt that the Court was correct in stating that the *Feres* case "held only that the government is not liable under the . . . Act for injuries to service-

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[4]The crux of this argument is that although the act relaxed governmental immunity from suit to some extent, it did not create new causes of action; thus there must be a private tort counterpart in the general law of torts, for by section 2674 of the act, the government is only liable "in the same manner and to the same extent as a private individual under like circumstances."

[5]One circuit held the government not liable for negligent calculations of weather reports because there was no comparable private liability. National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954). Another, however, held the government liable where the Coast Guard negligently marked a wrecked vessel, stating that essentially governmental functions were not exempt simply because there was no private tort counterpart. Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951); *accord*, Mid-Central Fish Co. v. United States, 112 F. Supp. 792 (W.D. Mo. 1953). A recent court of appeals case held the government liable for Coast Guard negligence in the conduct of a helicopter air-sea rescue. United States v. Lawter, 219 F.2d 559 (5th Cir. 1955).

[6]340 U.S. 135 (1950).

[7]346 U.S. 15 (1953).

[8]"One obvious shortcoming in these claims is that the plaintiffs can point to no liability of a 'private individual' even remotely analogous . . . nor is there any liability 'under like circumstances' for no private individual has power . . . to conscript . . . a private army." 340 U.S. at 141.

[9]"The relationship between the government and members of its armed forces is distinctly federal in character." 340 U.S. at 143.

[10]In the *Feres* case, the complainant Feres was quartered in barracks known to be unsafe due to a defective heating unit. Complainants Jefferson and Griggs were the victims of malpractice by army doctors.

[11]See note 1 *supra*.

[12]346 U.S. at 44. The last portion of this rationale seems to be begging the question, for the act has waived this pre-existing immunity to some extent. The question is, to what extent?

men. . . ."[13] The *Dalehite* case, however, is not so easily distinguishable from the case under consideration and seems to be strong authority for the government's position although it was not expressly overruled, in whole or in part. It is clear from the *Dalehite* opinion regarding firefighting that the case was not decided exclusively on the discretionary function provision of the act. It is equally clear that the negligent firefighting count was dismissed solely because there was no analogous private liability. By the same token, there is no analogous private liability in the instant case in that lighthouse operations are considered purely governmental. One would imagine government counsel somewhat dismayed when the Court in the instant opinion remarked: "The differences between this case and *Dalehite* need not be labored. The governing factors in *Dalehite* sufficiently emerge from the opinion in that case."[14]

In the case under consideration, the majority remarked that the government read the statute as if it imposed liability as a private individual under the *same* circumstances while the statutory language is under *like* circumstances. It was further pointed out that the government's basis of differentiation would be gone if the United States permitted private operation of lighthouses. This reasoning seems sound and, it is felt, fits the intention of the act. However, it completely disregards and is inconsistent with that portion of the *Dalehite* opinion regarding negligent firefighting. Because the *Dalehite* case was not overruled, formally at least, it is possible that there still remains some ambiguity as to governmental liability "as a private person."[15] This much, however, appears certain by way of the instant case: The government, contrary to what might be assumed from the *Dalehite* decision, is not now exempt from liability for injuries caused in the course of uniquely governmental functions simply because there is no private analogous tort counterpart. The conclusion seems to follow, then, that if a private individual would have incurred liability under the general law of torts, *had* he been engaged in the same activity as the government, the latter will be liable.

Jack F. Dunbar

TORTS—INDUCING BREACH OF CONTRACT

The Pure Milk Association entered into marketing contracts with dairy farmers, whereby the association was authorized to receive directly from the purchasers the proceeds of the farmers' sale of milk. Kraft Foods Company, a cheese manufacturer which had been buying milk from the farmers, after being advised of the marketing agreements sent letters to the farmers requesting that they state whether they wished the manufacturer to pay proceeds from sale of milk to the association. Only about half the farmers directed the manufacturer to pay proceeds to the association; the manufacturer paid directly to the other farmers the full price for the milk. Action was bought by the association against the manufacturer for inducing the farmers to breach their marketing contracts with the association. The lower court entered a decree in favor of the plaintiff, and the defendant appealed. HELD: The manufacturer violated duty not to persuade or solicit farmers to breach contract with the association, and was liable for damages occasioned thereby. *Pure Milk Ass'n v. Kraft Foods Co.*, 130 N.E.2d 765 (Ill. 1955).

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[13]76 S. Ct. at 127. Recovery has been allowed a non-military patient for injuries sustained due to malpractice in an army hospital. Costley v. United States, 181 F.2d 723 (5th Cir. 1950). The only difference between the *Costley* case and the *Feres* case is that the plaintiff was, in the *Costley* case, non-military. So it would seem that absent the status, there would be the requisite "analogous private liability."

[14]76 S. Ct. at 127.

[15]See note 1 *supra*.

It is generally accepted that a third party is liable in tort for procuring the breach of a contract by resort to means in themselves unlawful.[1] If the means employed are in themselves lawful, a minority of jurisdictions have imposed no liability for inducing another to breach his contract.[2] However, the majority view is that one who induces the breach of a contract is guilty of an actionable tort if certain requisite elements are present.[3] To establish liability, it is necessary that a contract existed,[4] that such contract was valid,[5] that the defendant was aware of the contract,[6] that the interference was intentional[7] and malicious,[8] that the act of the defendant was the proximate cause of the breach,[9] and that the plaintiff was damaged thereby.[10] The element of malice imports no ill will but is malice in its legal sense; that is, the intentional doing of a harmful act without legal justification or excuse.[11] If interference with a contract is justified, no action for inducing its breach can be maintained.[12] In the instant case in a close factual situation the court held that the defendant was not justified in interfering with the contract.

The ambiguity of the element of malice has militated against the formulation of clear rules of liability for inducing the breach of a contract. Although it is generally accepted that malice is used in its legal sense,[13] a reading of the cases finds malice

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[1]Gudger v. Manton, 21 Cal. 2d 537, 134 P.2d 217 (1943) (libel and slander); Wade v. Culp, 107 Ind. App. 503, 23 N.E.2d 615 (1939) (use of force, threat of force, or fraud). See also Taylor v. Pratt, 135 Me. 282, 195 Atl. 205 (1937); Union Car Advertising Co. v. Collier, 263 N.Y. 386, 189 N. E. 463 (1934).

[2]Cust v. Item Co., 200 La. 515, 8 So.2d 361 (1942). "An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it." Holder v. Atlantic Joint Stock Land Bank, 208 N.C. 38, 178 S.E. 861 (1935).

[3]Moore v. Roberts, 55 Ga. App. 241, 190 S.E. 41 (1937); Caverno v. Fellows, 286 Mass. 440, 190 N.E. 739 (1934); Quinlivan v. Brown Oil Co., 96 Mont. 147, 29 P.2d 374 (1934); Louis Schlesinger Co. v. Rice, 4 N.J. 169, 72 A.2d 197 (1950); Van Wyck v. Mannino, 256 App. Div. 256, 9 N.Y.S.2d 684 (1939); Reichman v. Drake, 89 Ohio App. 222, 100 N.E.2d 533 (1951); Klauder v. Cregar, 327 Pa. 1, 192 Atl. 667 (1937).

[4]Rosenkoff v. Mariani, 207 F.2d 449 (D.C. Cir. 1953); Triangle Film Corp. v. Artcraft Pictures Corp., 250 Fed. 981, 7 A.L.R. 303 (2d Cir. 1918).

[5]Grimm v. Baumgart, 121 Ind. App. 626, 96 N.E.2d 915 (1951); Levy v. Ross, 81 N.Y.S.2d 472 (Sup. Ct. 1948); Chitwood v. McMillan, 189 S.C. 262, 1 S.E.2d 162 (1939).

[6]Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P.2d 631 (1941); Eddyside Co. v. Seibel, 142 Pa. Super. 174, 15 A.2d 691 (1940); Kenworthy v. Kleinberg, 182 Wash. 425, 47 P.2d 825 (1935).

[7]Imperial Ice Co. v. Rossier, *supra* note 6; Klauder v. Cregar, 327 Pa. 1, 192 Atl. 667 (1937). Courts have been reluctant to hold one liable for negligent interference with a contract. See PROSSER, TORTS § 106 (2d ed. 1955); 86 C.J.S., *Torts* § 44 (1954).

[8]Van Wyck v. Mannino, 256 App. Div. 256, 9 N.Y.S.2d 684 (1939); Klauder v. Cregar, *supra* note 7.

[9]United States v. Newbury Mfg. Co., 36 F. Supp. 602 (D. Mass. 1941); Beekman v. Marsters, 195 Mass. 205, 80 N.E. 817 (1907).

[10]Royalty Realty Co. v. Levin, 69 N.W.2d 667 (Minn. 1955); Simon v. Noma Electric Corp., 293 N.Y. 171, 56 N.E.2d 537 (1944).

[11]Reichman v. Drake, 89 Ohio App. 222, 100 N.E.2d 533 (1951). See cases cited in 30 AM. JUR., *Interference* § 23 (1940).

[12]National Life & Acc. Ins. Co. v. Wallace, 162 Okla. 174, 21 P.2d 492 (1933), where the court held: "Procuring the breach of a contract in the exercise of an equal or superior right is acting with just cause or excuse, and is justification for what would otherwise be an actionable wrong." Caskie v. Philadelphia Rapid Transit Co., 334 Pa. 33, 5 A.2d 368 (1939), where the court referred to the necessary ingredient of malice as "the wanton disregard of the rights of the other party," and held: "When anyone seeks to enforce what he regards as his own rights, he cannot be held guilty of a wanton disregard of the rights of others." See also Herbits v. Constitution Indemnity Co., 279 Mass. 539, 181 N.E. 723 (1932).

[13]See note 11 *supra*.

defined in divers terms and phrases.[14] Since all of the component parts of legal malice —with the exception of lack of legal justification or excuse—are included in the essential elements of the tort, lack of justification could be beneficially substituted for the equivocal element of malice.

John M. Bee

TORTS—TELEVISION NEWSCAST AS INVASION OF PRIVACY

Plaintiff was an innocent bystander in a cigar shop which was the second stop in a gambling raid by peace officers. A "canned" film of the entire raid was made by defendant television station. The film included photographs[1] showing plaintiff's interrogation by the officers. It was exhibited as a part of a news telecast by defendant. Plaintiff filed an action for damages alleging violation of his right of privacy.[2] HELD:[3] The showing of plaintiff's picture on the telecast in the manner in which it appeared was, as a matter of law, not an unreasonable or unwarranted invasion of his privacy. *Jacova v. Southern Radio and Television Co.*, 83 So.2d 34 (Fla. 1955).

Whether the right of privacy was simply not recognized[4] and enforced as such at the earlier common law, or whether the right always existed without a remedy for its enforcement,[5] it is certain that its recognition as a distinct and legally enforceable right gained its greatest impetus from an article in the *Harvard Law Review* in 1890.[6] Like all infants in the law the doctrine had an uneven beginning.[7] Since it is still an

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[14]Dade Enterprises v. Wometco Theatres, 119 Fla. 70, 160 So. 209 (1935), where the court stated: "To do intentionally that which is calculated in the ordinary course of events to damage, and which in fact does damage, another person in his property or trade, is malicious in the law. . . ." Quinlivan v. Brown Oil Co., 96 Mont. 147, 29 P.2d 374 (1934), where the court defined malice as "the intentional doing of a wrongful act without legal justification or excuse, or, in other words, the willful violation of a known right." Caskie v. Philadelphia Rapid Transit Co., 334 Pa. 33, 5 A.2d 368 (1939), where the court referred to malice as "the wanton disregard of the rights of the other party." See also Louis Schlesinger Co. v. Rice, 4 N.J. 169, 72 A.2d 197 (1950), where the court stated: "Malice may be inferred from the absence of just cause or excuse."

[1]The scenes showing the plaintiff consumed several seconds of the film—not more than twelve or fifteen according to the statement of defendant's counsel in brief. 83 So.2d at 36.

[2]Plaintiff set out with a dual theory of recovery: invasion of privacy plus libel. The court summarily ruled out the libel approach, noting that no reasonable person viewing the film could have inferred that plaintiff was being arrested. This Casenote is addressed only to the invasion of privacy question.

[3]The Circuit Court, Dade County, Florida, granted a summary judgment in favor of the defendant, whence this appeal.

[4]Brunson v. Ranks Army Store, 73 N.W.2d 803 (Neb. 1955).

[5]Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945). A number of courts in the first half of the nineteenth century had afforded relief for invasion of privacy, obliquely reaching their results on other grounds. See Prince Albert v. Strange, 2 De G. & Sm. 652, 64 Eng. Rep. 293, *aff'd*, 1 Macn. & G. 25, 41 Eng. Rep. 1171 (Ch. 1849) (restraining unauthorized publication of etchings as invasion of property right); Routh v. Webster, 10 Beav. 561 (Ch. 1847) (restraining unauthorized use of plaintiff's name in company prospectus on grounds of risk of liability); Abernathy v. Hutchinson, 3 L.J. Ch. 209 (1825) (restraining publication of oral lectures as breach of confidence).

[6]Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[7]In July 1891 the first American case turned on the theory that had been advocated a year earlier by Brandeis and Warren. See MacKenzie v. Soden Mineral Springs Co.,

infant it is currently accorded a mixed treatment.[8] The limitations of the right are largely unfixed, the nature not altogether certain. The chief controversy thus far has been whether or not the right of privacy in fact exists; hence, where it does exist, even by statute, it is dealt with largely on an ad hoc basis. Whatever symmetry it possesses results perhaps from the general agreement that it is an incident of the person and not a property right. Prosser[9] has observed that the cases seem to group themselves according to whether the defendant (1) intruded upon physical solitude

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27 Abb. N. Cas. 402, 18 N.Y. Supp. 240 (Sup. Ct. 1891). Two months later, in September 1891, a New York court in plain terms recognized "the right to be left alone." Schuyler v. Curtis, 15 N.Y. Supp. 784 (1891), *aff'd*, 19 N.Y. Supp. 264 (S. Ct. 1892). Quixotically enough it was a New York court that furnished the first major setback for the new tort. See Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). In a split decision the majority, expressly denying the existence of the right, refused to enjoin unauthorized use of plaintiff's picture for advertising purposes. The New York legislature in 1903 gave ear to the public disapproval of the *Roberson* case by enacting N.Y. Laws 1903, c. 132 (now N.Y. Civ. Rights Law §§ 50, 51), which prohibited unauthorized use of an individual's photograph for advertising purposes.

[8]In the following jurisdictions the right of privacy seems to be recognized as a part of the common law: Alabama, Birmingham Broadcasting Co. v. Bell, 259 Ala. 656, 68 So.2d 314 (1953); Arizona, Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945); California, Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 253 P.2d 441 (1953); District of Columbia, Peay v. Curtis Pub. Co., 78 F. Supp. 305 (1948); Florida, Cason v. Baskin, 155 Fla. 198, 20 So.2d 243 (1944); Georgia, Walker v. Whittle, 83 Ga. App. 445, 63 S.E.2d 87 (1951); Illinois, Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952); Indiana, Continental Optical Co. v. Reed, 119 Ind. 643, 86 N.E.2d 306 (1949); Kansas, Johnson v. Boeing Airplane Co., 175 Kan. 275, 262 P.2d 808 (1953); Kentucky, Lucas v. Moskins Stores, 262 S.W.2d 679 (Ky. 1953); Louisiana, Hamilton v. Lumbermen's Mut. Cas. Co., 226 La. 664, 82 So.2d 61 (1955); Michigan, Pallas v. Crowlery-Milner & Co., 334 Mich. 282, 54 N.W.2d 595 (1952); Minnesota, Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948); Missouri, State *ex rel.* Clemens v. Witthaus, 360 Mo. 274, 228 S.W.2d 4 (1950); Montana, Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952); New Jersey, Anthony v. Anthony, 9 N.J. Super. 411, 74 A.2d 919 (1950); North Carolina, Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Ohio, Schmukler v. Ohio Bell Tel. Co., 116 N.E.2d 819 (1953); Oklahoma, McKinzie v. Huckaby, 112 F. Supp. 642 (W.D. Okla. 1953); Oregon, Hinish v. Meier & Frank Co., 116 Ore. 482, 113 P.2d 438 (1941); Pennsylvania, Jenkins v. Dell Pub. Co., 132 F. Supp. 556 (W.D. Pa. 1955); South Carolina, Holloman v. Life Ins. Co., 192 S.C. 454, 7 S.E.2d 169 (1940).

Three states have given effect to the right by statute: New York, N.Y. Civ. Rights Law §§ 50, 51, and see Rubino v. Slaughter, 136 N.Y.S.2d 873 (1954); Utah, Utah Code Ann. §§ 76-4-7, 76-4-8, 76-4-9 (1953), and see Donahue v. Warner Bros. Pictures, 194 F.2d 6 (10th Cir. 1952); Virginia, Va. Code Ann. § 8-650 (1950). Virginia's statute does not appear to have been construed.

Six states have never expressly recognized the right of privacy, but it is to be noted that when cases have arisen touching the subject these states have never denied that such a right exists. Arkansas, Mabry v. Kettering, 92 Ark. 81, 122 S.W. 115 (1909); Colorado, McCreery v. Miller's Grocerteria Co., 99 Colo. 499, 64 P.2d 803 (1937); Connecticut, Urban v. Hartford Gas Co., 139 Conn. 301, 93 A.2d 292 (1952); Massachusetts, Kelly v. Post Pub. Co., 327 Mass. 275, 98 N.E.2d 286 (1951); Mississippi, Martin v. Dorton, 210 Miss. 668, 50 So.2d 391 (1951); Washington, Lewis v. Physicians & Dentists Credit Bureau, 27 Wash. 2d 267, 177 P.2d 896 (1947).

The following jurisdictions expressly deny existence of the right: Nebraska, Brunson v. Ranks Army Store, 73 N.W.2d 803 (Neb. 1955); Rhode Island, Henry v. Cherry & Webb, 30 R.I. 13, 73 Atl. 97 (1909); Texas, Milner v. Red River Valley Pub. Co., 249 S.W.2d 227 (Tex. Civ. App. 1952); Wisconsin, Judevine v. Benzies-Montanye Fuel and Warehouse Co., 222 Wis. 512, 269 N.W. 295 (1936).

Fourteen states do not appear to have dealt with the issue: Delaware, Idaho, Iowa, Maine, Maryland, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Tennessee, Vermont, West Virginia, and Wyoming.

The right is defined and approved in Restatement, Torts § 867 (1939).

[9]Prosser, Torts § 97 (1955).

or seclusion,[10] (2) gave publicity to private information where no action for defamation would lie,[11] (3) placed one in a false but not necessarily defamatory light in the public eye,[12] or (4) appropriated an element of one's personality for commercial use.[13] However helpful this attempt to sort out the cases may be it is at once clear that the lines separating the wrongs supporting this tort action are perforce blurred and likely to remain so. The Supreme Court of Mississippi has addressed itself to the question only once,[14] and in that instance somewhat obliquely as a result of the posture in which the topic arose. A photographer without permission took a photograph of a sheriff. The sheriff, who struck and kicked the photographer, defended the photographer's action for assault and battery on the theory that taking the picture was an invasion of privacy and amounted to a figurative first blow.[15] The court held that a public officer cannot complain that his right of privacy has been invaded when his photograph is taken for publication in connection with a legitimate news story. The court expressly pretermitted any decision as to the operation of the right of privacy where private persons are the victims. The tone of Chief Justice McGehee, however, seemingly renders safe the prediction that when a proper case arises a Mississippi plaintiff, unshackled by public office or public notoriety, will be able to obtain redress in our courts.

The only novel aspect presented by the case under scrutiny is furnished by the plaintiff's allegation that his right of privacy was invaded by a television newscast. Florida had previously decided that in a proper case a plaintiff might obtain relief.[16] Is a proper case for recovery presented when an innocent bystander in a newsworthy event has his image flashed on a television screen for perhaps fifteen seconds in such a manner that "it was enough to show that he was under suspicion of being involved in the gambling activities for which the officers were searching?"[17] With due deference to the learned Florida court, if such a complaint is so weak that it falls on a motion for summary judgment perhaps it would be better hereafter to seek shelter exclusively in defamation. If television is to run amok under the cloak of expediency the only remedy will be the law of defamation which, it is submitted, is not adequate to cope with the problem.[18] The thirst of the public for information is a compelling force, but the longing of some for solitude and obscurity is not without some merit.

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[10]Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924).

[11]Barber v. Time, 348 Mo. 1199, 159 S.W.2d 291 (1942).

[12]Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (1942).

[13]Eick v. Perk Dog Food, 347 Ill. App. 293, 106 N.E.2d 742 (1952).

[14]Martin v. Dorton, 210 Miss. 668, 50 So.2d 391 (1951).

[15]This case has certain points of contact with another less binding but perhaps more sensational bit of unreported litigation. Miss Sally Rand, who attained some prominence as a bubble dancer, had her picture made by an unlicensed photographer. Miss Rand attacked the gentleman, and when he sued her for assault and battery she defended on the theory that the invasion of her privacy was tantamount to a first blow and afforded justification for her attack. The court took a dim view of Miss Rand's plaint and reasoned, "If Sally Rand were to take a bath and charge admission there would be no violation of her right of privacy if someone came in and took a picture." See Time, Nov. 14, 1938, p. 34.

[16]Zelma Cason sued Marjorie Kinnan Rawlings (Baskin) alleging that in her book, *Cross Creek*, Mrs. Baskin published what purported to be a biographical sketch of plaintiff, thereby violating plaintiff's personality, cheapening her name, subjecting her to contempt, ridicule and inquisitive notice, and invading her privacy. The trial court sustained demurrers to each of the four counts in the declaration. The Supreme Court of Florida reversed and remanded, holding that the second count in the declaration, framed on a theory of invasion of privacy, stated a cause of action. Cason v. Baskin, 155 Fla. 198, So.2d 243 (1944).

[17]83 So.2d at 36.

[18]See note 2 *supra*.

When the courts come to balance the scales in dealing with these privacy cases, they arrive at a point in the social spectrum calculated to insure liberty for all without surrendering the freedom of action of any. Did the Florida court in the principal case tip the scales the wrong way? It would seem so, for if a man is unable to appear in a public place without some assurance from the courts that he will not be exhibited on a television screen as a suspect in gambling activities it is time for the legislatures to devise some effective antidote for the public's apparently unslakable thirst for news.

Scott Tennyson

TORTS—WRONGFUL DEATH—CONTRIBUTORY NEGLIGENCE OF WIFE IMPUTED TO HUSBAND TO BAR HIS RECOVERY UNDER WRONGFUL DEATH STATUTE

While running across the street in front of his home, the plaintiff's son was struck and killed by an automobile operated by the defendant. Alleging negligence, plaintiff, the father, sued under the Florida Wrongful Death Statute[1] which gives a father a right of action for loss of services and pain and suffering caused him and his wife by the child's death.[2] The plaintiff's wife had customarily allowed the child to play in the unfenced front yard with the plaintiff's knowledge and tacit consent. Just prior to the accident the child had been unattended in the front yard abutting the street on which the defendant's car ran over and killed him. From a verdict and judgment in favor of the defendant, plaintiff appealed on the ground that the lower court erred in instructing the jury that if the mother negligently contributed to the child's death, her negligence would be imputed to the plaintiff to bar his whole claim. HELD:[3] The instruction was correct since the father was suing not only for damages to himself, but also to his wife, and any defenses which would be appropriate to a claim made on her behalf might be interposed. Any negligent act or omission on the part of the mother of which the father had or reasonably should have had knowledge is a defense in such an action brought by the father.[4] *Klepper v. Breslin*, 83 So.2d 587 (Fla. 1955).

The right to sue for the wrongful death of another was not known at common

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[1]"Whenever the death of any minor child shall be caused by the wrongful act, negligence, carelessness or default of any . . . person, . . . the father of such minor child, or if the father be not living, the mother may maintain an action against such individual, . . . and may recover, not only for the loss of services of such minor child, but in addition thereto, such sum for the mental pain and suffering of the parent (or both parents) if they survive, as the jury may assess." FLA. STAT. ANN. § 768.03 (1944).

[2]It should be borne in mind that while the statute gives a right of action to the father only where he is alive and living in a normal family relationship with his wife and children, the father may collect damages for suffering to his wife occasioned by the child's death; thus, the wife is, in effect, made a beneficiary under the statute.

[3]Two justices dissented.

[4]It should be noted that the majority opinion expressly negated the idea that the basis of its decision was the imputation of the negligence of a custodian of a child. "In Winner v. Sharp, 43 So.2d 634 (Fla. 1950), we recognized the contributory negligence of a custodian of a minor child as constituting a defense to an action by the father for the wrongful death of a minor. In mentioning this case we are not intending to hold that the mother occupies the position of a third party custodian who might have charge of the child with the consent of the parents for a particular time, although so far as the father is concerned in the normal family relationship it cannot be denied that in his absence and oftentimes in his presence, he recognizes the peculiar qualities of the mother to care for and supervise the conduct of an infant and to that extent he endows her with all of the authority that he himself might enjoy and otherwise assert in the matter of supervising the child and its conduct. Such appears to have been the situation in the case at bar." 83 So.2d at 593.

law, since the right of action was considered extinguished by the death of the injured party.[5] With the enactment of Lord Campbell's Act[6] in the nineteenth century in England, a new right of action was created in favor of the family of one tortiously killed.[7] All the states have enacted similar legislation.[8] Generally contributory negligence will be imputed to a plaintiff only where he would have been liable as a defendant for the tort of that person whose negligence has been imputed to him, as in the master-servant and principal-agent relationships.[9] But the imputation of negligence has been based on other relationships, one of them the marital relationship,[10] and another the guardian-child relationship.[11] Today most jurisdictions have discarded the practice of imputing negligence of one spouse to another simply on the basis of that relationship,[12] and the great weight of authority now is that contributory negligence of one spouse will not be imputed to the other to bar recovery for the wrongful death of their child:[13] only a few jurisdictions hold to the contrary.[14]

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[5]Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808); 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923); Hay, *Death as a Civil Cause of Action in Massachusetts*, 7 HARV. L. REV. 170 (1893); Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431 (1916); Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239 (1929).

[6]Fatal Accidents Act of 1846, 9 and 10 VICT., c. 93.

[7]The passing of this statute must have been motivated in part at least by a desire to avoid the obvious unfairness of putting a tort-feasor who had merely injured his victim in a worse position than one who had actually killed him.

[8]For a listing and categorization of the wrongful death statutes, see 39 IOWA L. REV. 494 (1954).

[9]RESTATEMENT, TORTS § 485 (1934).

[10]The doctrine has been widely criticized. See Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193 (1921); Gregory, *Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services*, 2 U. CHI. L. REV. 173 (1935); Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 YALE L.J. 831 (1932); Keeton, *Imputed Contributory Negligence*, 13 TEX. L. REV. 161 (1936).

[11]Waite v. North Eastern Ry., 1 El. Bl. & El. 719 (1858), held that the contributory negligence of a guardian to whom the parents had entrusted the plaintiff-child would bar the child's recovery for injuries caused by the negligence of the defendant and the guardian. Oliver v. Birmingham & Midlands Omnibus Co., 1 K.B. 35 (1933), overruled the *Waite* case, but in the interim the rule had been adopted in some American jurisdictions. Kyne v. Wilmington & N.R.R., 13 Del. 185, 14 Atl. 922 (1888); Morgan v. Aroostook Valley R.R., 115 Me. 171, 98 Atl. 628 (1916); County Comm'nrs v. Beulah, 153 Md. 221, 138 Atl. 25 (1927); Sullivan v. Chadwick, 236 Mass. 130, 127 N.E. 632 (1920); Jacobs v. H. J. Koehler Sporting Goods Co., 208 N.Y. 416, 102 N.E. 519, 1917F L.R.A. 7 (1913); McGarry v. Loomis, 63 N.Y. 104, 20 Am. St. Rep. 510 (1875); Hartfield v. Roper, 21 N.Y. 615, 34 Am. Dec. 273 (1839).

[12]This was partially due to the Married Women's Property Acts which, beginning in the middle of the last century, were enacted in all the states.

[13]Phillips v. Denver City Tramway Co., 53 Colo. 458, 128 Pac. 460, 1914B Ann. Cas. 29 (1912); Atlanta & Co. Air-Line Ry. v. Gravitt, 93 Ga. 369, 20 S.E. 550, 44 Am. St. Rep. 145, 26 L.R.A. 553 (1894); Donk Bros. Coal & Coke Co. v. Leavitt, 109 Ill. App. 385 (1903); Lindley v. Sink, 218 Ind. 1, 30 N.E.2d 456, 2 A.L.R.2d 772 (1940); Love v. Detroit, J. &. C.R.R., 170 Mich. 1, 135 N.W. 963 (1912); Reynolds v. Thompson, 215 S.W.2d 452 (Mo. 1948); Herrell v. St. Louis-San Francisco Ry., 324 Mo. 38, 23 S.W.2d 102 (1929); Los Angeles & S.L. Ry. v. Umbaugh, 61 Nev. 214, 123 P.2d 224 (1942); Consolidated Traction Co. v. Hone, 59 N.J.L. 275, 35 Atl. 899 (1896); Lewin v. Lehigh Val. Ry., 52 App. Div. 69, 65 N.Y. Supp. 49 (1900); Pearson v. National Mfg. & Stores Corp., 219 N.C. 717, 14 S.E.2d 811 (1941); Cleveland A. & C.R.R. v. Workman, 66 Ohio St. 509, 64 N.E. 582, 90 Am. St. Rep. 602 (1902); Wolf v. Lake Erie and W. Ry., 55 Ohio St. 517, 45 N.E. 708, 35 L.R.A. 812 (1896); Lakeview, Inc. v. Davidson, 166 Okla. 171, 26 P.2d 760 (1933); McDonald v. O'Reilly, 45 Ore. 589, 78 Pac. 753 (1904); Horne v. Atlantic Coast Line R.R., 177 S.C. 461, 181 S.E. 642 (1935); Tufty v. Sioux Transit Co., 70 S.D. 352, 7 N.W.2d 700 (1945); City of Danville v. Howard, 156 Va. 32, 157 S.E. 733 (1931); Potts v. Union Traction Co., 75 W. Va. 212, 83 S.E. 918 (1914).

[14]Agdeppa v. Glougie, 71 Cal. App. 2d 463, 162 P.2d 944 (1945); Dull v. Atchison,

Courts following the minority view do so usually because community property laws obtain in those jurisdictions,[15] or because the particular statute makes the damages indivisible.[16]

It would seem that this court has carried a dying doctrine further than need be inasmuch as in the instant case the jury could have been instructed to find the amount of damages which the wife sustained for her pain and suffering and to subtract this amount from the damages awarded the father. Probably a fairer result would have been reached had this been done, for the rule which imputes the negligence of one spouse to another is based on precedent the reason for which no longer exists.[17]

Gail Mckinney Wheat

WILLS—IMPLIED REVOCATION OF A PRIOR WILL BY A SUBSEQUENT INCONSISTENT WILL

Crawford died leaving an estate of $5,400 and mineral rights in an eighty-acre tract of land. He left two wills, each devising the estate to different persons. The earlier will named a sister as sole devisee and executrix. The later will named a nephew as sole devisee and executor. The nephew was one of the two subscribing witnesses to the later will. Crawford's heirs were eleven brothers and sisters, with whom he had had little contact. The chancery court probated the second will and dismissed a petition for probate of the first will. HELD: A later will, which is absolutely inconsistent with a prior will, revokes by implication the prior will even though the dispositive provisions of the later will are inoperative. *Crawford's Estate v. Crawford,* 82 So.2d 823 (Miss. 1955).

An instrument not executed according to the formalities of the statutes governing

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T. & S.F.R.R., 27 Cal. App. 2d 473, 81 P.2d 158 (1938); Keena v. United States R.R., 57 Cal. App. 124, 207 Pac. 35 (1922); Hazel v. Hoopestown-Danville Motor Bus. Co., 310 Ill. 38, 141 N.E. 392, 30 A.L.R. 491 (1923); Edwards v. Negley, 193 Ill. App. 426 (1914); Toner's Adm'r v. S. Covington & C. Street Ry., 109 Ky. 41, 58 S.W. 439 (1900); Mills v. Cavanaugh, 29 Ky. L. Rep. 685, 94 S.W. 651 (1906); Green v. Chicago & W. M. Ry., 110 Mich. 648, 68 N.W. 988 (1896); Nichols v. Nashville Housing Authority, 187 Tenn. 683, 216 S.W.2d 694 (1949); Crevelli v. Chicago M. & St. P.R.R., 98 Wash. 42, 167 Pac. 66, 1918A L.R.A. 206 (1917); Vinnette v. Northern Pac. R.R., 47 Wash. 320, 91 Pac. 975, 18 L.R.A. (n.s.) 328 (1907).

[15]Agdeppa v. Glougie, *supra* note 14; Dull v. Atchison, T. & S.F.R.R., *supra* note 14; Keena v. United States R.R., *supra* note 14. But in Bowen v. Kizirian, 105 Cal. App. 286, 287 Pac. 570 (1930), where suit was by the father and daughter for the death of the mother, the contributory negligence of the father was not imputed to the daughter, as there was no question of community property. The court said: "No such reason applies as in the case of a minor child, in which case it was held that, since the wife represents the community, her negligence is that of the husband, and will prevent recovery on the part of the community." See also Flores v. Brown, 39 Cal. App. 2d 622, 248 P.2d 922 (1952); Crenelli v. Chicago M. & St. P.R.R., *supra* note 14; Vinnette v. Northern Pac. R.R., *supra* note 14.

[16]Hazel v. Hoopestown-Danville Motor Bus Co., 310 Ill. 38, 141 N.E. 392, 30 A.L.R. 491 (1923); Edwards v. Negley, 193 Ill. App. 426 (1914); Toner's Adm'r v. S. Covington & C. Street Ry., 109 Ky. 41, 58 S.W. 439 (1900).

[17]It is interesting to note that in its decision the court cited Winner v. Sharp, 43 So.2d 634 (Fla. 1950), where it was held that the contributory negligence of the wife was a bar to the recovery of damages to her; but that case did not hold that her negligence barred the whole claim. Also Florida had expressly repudiated the doctrine of imputed contributory negligence in these cases: Bessett v. Hackett, 66 So.2d 694 (Fla. 1953); De Salvo v. Curry, 160 Fla. 7, 33 So.2d 215 (1948); Seaboard Air Line Ry. v. Watson, 94 Fla. 571, 113 So. 716 (1927).

the execution of wills, and for that reason not entitled to probate, does not impliedly revoke an earlier will, though wholly inconsistent with it.[1] The courts are in disagreement, however, where there are inoperative dispositions of property under a properly and legally executed later will. Some courts hold that the later inconsistent will ipso facto revokes the earlier will.[2] In *Hairston v. Hairston* it was stated that a subsequent will revokes by implication a prior will though the sole devisee under the subsequent will could not take because of incapacity.[3] A codicil which makes a disposition of the testator's property inconsistent with the disposition made in a will impliedly revokes the will to the extent of the inconsistency though the codicil is partially void.[4] It was held in *Wheat v. Lacals* that a later will containing inconsistent provisions impliedly revoked a prior will though a remainder created by the later will was, by statute, void.[5] *Mort v. Baker University* held that where a second will, properly and legally executed, is inoperative because of the incapacity of the devisee or any other matter dehors the will, a former will is nevertheless revoked by it.[6] This same reasoning was applied in *Carpenter v. Miller*.[7] The above cases illustrate a *rigid* rule. But there are other cases which do not follow this unbending rule.[8] In *Austin v. Oakes*[9] the court held that a codicil containing an unlawful exercise of a power of appointment did not revoke a will containing a lawful exercise of the power. Invalid dispositions in a subsequent will do not impliedly revoke valid dispositions in an earlier will, and are ineffective for any purpose.[10] Similarly, it was held that where a codicil repugnant to an earlier will was void under the Rule Against Perpetuities, the will was not revoked.[11] In the English case of *Ward v. Van der Loeff*[12] the court decided that if the only revocation is that which is to be inferred from the inconsistency of the subsequent disposition with the earlier one, there is no revocation if the second disposition is void for remoteness. In *Ewell v. Sneed* it was held that a void codicil inconsistent with a will did not revoke the will.[13]

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[1]See, *e.g.*, Re Hueler, 207 Cal. 391, 278 Pac. 1031 (1929); Moore v. Rowlett, 269 Ill. 88, 109 N.E. 682 (1915); Wilbourn v. Shell, 59 Miss. 205 (1881).

[2]Wheat v. Lacals, 139 Miss. 300, 104 So. 73 (1925); Hairston v. Hairston, 30 Miss. 276 (1855); Read v. Manning, 30 Miss. 308 (1855); Mort v. Baker University, 229 Mo. App. 632, 78 S.W.2d 498 (1935); Adams v. Cowan, 160 Va. 1, 168 S.E. 750 (1933); Kearns v. Roush, 106 W. Va. 663, 146 S.E. 729 (1929); Carpenter v. Miller, 3 W. Va. 174 (1869).

[3]*Supra* note 2. The court was dealing with an express clause of revocation; hence its remarks are dicta.

[4]Read v. Manning, 30 Miss. 308 (1855). Testator gave his slaves absolutely to his wife by a will but by a codicil gave them to her, "if she should marry and have issue; otherwise they should be set free." The codicil was void as to the attempted emancipation of the slaves.

[5]139 Miss. 300, 104 So. 73 (1925).

[6]229 Mo. App. 632, 78 S.W.2d 498 (1935). The bequest was void in the second will because of uncertainty as to the beneficiary.

[7]3 W. Va. 174 (1869). Here a clause in a codicil devising an estate "to the propagation of the Gospel in foreign lands" was void for uncertainty of the devisee.

[8]In re Marx's Estate, 174 Cal. 762, 164 Pac. 640 (1917); U. S. Fidelity & Guaranty Co. v. Douglas' Estate, 134 Ky. 374, 120 S.W. 328 (1909); In re Pilsbury, 186 N.Y. 545, 79 N.E. 114 (1906); Austin v. Oakes, 117 N.Y. 577, 23 N.E. 193 (1890); Altrock v. Vandenburgh, 25 N.Y. Supp. 851 (Sup. Ct. 1893); In re Street's Estate, 138 Okla. 115, 280 Pac. 413 (1929); Ewell v. Sneed, 136 Tenn. 602, 191 S.W. 131 (1917); Ward v. Van der Loeff, [1924] A.C. 653.

[9]*Supra* note 8.

[10]In re Marx's Estate, 174 Cal. 762, 164 Pac. 640 (1917).

[11]In re Street's Estate, 138 Okla. 115, 280 Pac. 413 (1929). The court gave consideration to the testator's apparent desire to die testate.

[12][1924] A.C. 653.

[13]136 Tenn. 602, 191 S.W. 131 (1917). The dispositive provisions of the will favored a relative to whom the testatrix was obviously devoted. The court stated: ". . . [I]t was obvious that testatrix would not have revoked the earlier will had

The rule applied in the last group of cases may be summarized as follows: If the inconsistent dispositive clauses of the second will cannot take effect, the previous disposition is not revoked by implication. This rule is based on the doctrine of dependent relative revocation.[14]

The courts in applying the doctrine of dependent relative revocation seem to have grouped together cases involving implied revocation where the second will is *expressly* conditional[15] and cases involving implied revocation under a mistake of law or fact.[16] But the doctrine properly applies only in the former cases, since it is couched in terms of condition. In the latter cases, which are more numerous, it would seem preferable to discard the fiction of conditional revocation and treat the problem as one of mistake.[17] The most logical solution in these cases and one that is argued for by able writers[18] is to uphold or disregard the revocation in accordance with what the testator *would probably have intended had he known of the error.* The surrounding circumstances and the terms of the subsequent instrument ofttimes enable a court to uncover important clues as to what the testator would have intended. Applying this test, it is highly probable that Crawford would have preferred his first will to an intestacy. There is no evidence tending to show that Crawford had lost his affection for his sister. The evidence only shows that he *preferred* to leave his estate to his nephew. Coupled with this is the fact that an intestacy results in division of the relatively small estate among eleven heirs. The same considerations will apply if the doctrine of dependent relative revocation is used. Thus whether a court chooses to talk about dependent relative revocation and conditions or simply about mistake, there is a sound basis for arriving at a desirable result, whereas the rule espoused in the instant case is inflexible and consequently less desirable.

Joe W. Hobbs

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she not supposed the codicil was valid; . . . it is clear that the revocation of the original will depended upon the efficacy of the codicil."

[14]Atkinson, Wills § 162 (1937); Warren, *Dependent Relative Revocation,* 33 Harv. L. Rev. 337 (1920); Annot., 51 A.L.R. 652 (1927).

[15]*E.g., A* leaves certain land to *B* by will. *A* by a later will devises the same land to *C,* if *C* be living at the time of *A*'s death.

[16]*E.g., A* by a will leaves certain land to *B. A* by a later will devises the same land to *C,* but *C* is unable to take because he is a suscribing witness. (mistake of law).

[17]Atkinson, *op. cit. supra* note 14; Scott, *Doctrine of Dependent Relative Revocation,* 16 Ky. L.J. 251 (1927); Warren, *supra* note 14.

[18]See note 14 *supra.*

RECENT BOOKS

AMERICAN CONSTITUTIONAL LAW. By Bernard Schwartz. Cambridge: Cambridge University Press. Pp. 364. $5.00.

It is always a healthy thing in a republic such as ours for the citizenry to interest itself in matters of constitutional law, for the Constitution and its interpretation are too important to everyone for it to be the sole property of judges and lawyers. To be most fruitful, however, public discussion should be based on a recognition of certain fundamental verities of our constitutional system. It is a commonplace, of course, that every man is his own constitutional lawyer, and that his interpretation of the broad generalities of the document will be in accordance with his own subjective hopes and fears.

And yet, if public enlightenment be of value, it is a little discouraging, in the midst of the constitutional controversy which has been sparked by the Supreme Court's school segregation decisions, to read and hear so many statements, opinions, assertions and charges—frequently by men in positions of power and responsibility—which can claim no objective support in our constitutional history. Much of this clamor no doubt is plain, old-fashioned political demagoguery, whose weapon typically is deception and confusion of the people; much of it no doubt comes from those whose more informed judgment has been overcome by their emotions; but surely much of it comes from sincere and well-intentioned people, and as to them, the only explanation must be simply that they do not understand the operation of our constitutional system of government and the position and function of the Supreme Court within it.

One reason for this lack of understanding, of course, is that our schools and colleges have never required that sufficient attention be given to the fundamentals of American law, government, politics and history, without which no citizen can fulfill his duties of good citizenship intelligently and effectively. It is alarming the number of first year law students, for example, who have not had prior study in these fields and whose principal acquaintanceship with them, prior to a law practice which frequently leads to a political career, will be a three- or four-hour course in constitutional law.

Anyone who has ever taught the course will realize the difficulty, even the impossibility, of adequately covering even the principal doctrinal themes, much less seeking to put them in some sort of historical, economic and social perspective. And one pedagogical aid which has been lacking to minimize the difficulty is a textual treatment of American constitutional law which is not too lengthy to be assigned for outside reading and which is yet comprehensive enough to be of substantial value. A perennial complaint of constitutional law students is the lack of a hornbook.

All of this is preliminary to saying that the book under review, although not a hornbook, is a very excellent summary study of the most important and basic aspects of American constitutional law and government. The author is professor of law at New York University School of Law, where he is the director of the Institute of Comparative Law. He is also the editor of the Bulletin of the Administrative Law Section of the American Bar Association. The book is divided into two parts, the first of which discusses the basic structure of the American system, with the second part dealing with modern developments.

Part I, "The Structure," has separate chapters dealing with the most important components of our constitutional system. One chapter discusses the bases of the

American system—the doctrine of judicial review, the separation of powers, and the rule of law. Another deals with the federal system itself, with a succinct discussion of its main features: the union of autonomous (not sovereign, note, but autonomous) states, the division of powers between nation and states, the direct operation of nati and states upon all within their territorial limits, the possession by both states and nation of the complete apparatus of law enforcement, the supremacy of national power. The judicial task in the maintenance of the federal system is illustrated by early commerce power cases. A third chapter analyzes the Congress from many points of view—its functions, composition, privileges of members, its organization, rules, how the committee system works, how it enacts laws, its overseeing of the administration, and its powers of investigation. Then follows a chapter on the President, which includes discussion of various topics such as the manner of election, tenure, the legislative role of the President, his power over foreign affairs, his function as administrative head of the government, the cabinet system, and the apparatus of independent regulatory commissions. The final chapter in Part I deals with the courts, with examination of their organization, manner of selection of judges, tenure, jurisdiction of the courts, legislative control over them, and their conflicts with the executive. Judicial self-limitation in constitutional interpretation is then examined through the case or controversy requirement, the concept of standing, and the doctrine of political questions. This chapter concludes with a discussion of the doctrine of stare decisis in constitutional law.

Part II, "Modern Developments," is composed of seven chapters, each of which discusses a particular problem which is of contemporary interest and importance. The "new federalism" is treated in one chapter—the effect of the New Deal, the current interpretations of the commerce power and the general welfare clause, and the decline of intergovernmental tax immunities. The author's conclusions on the future of American federalism are interesting enough to quote in full:

"Though the American States appear likely to decline even more from the position of independent sovereigns which they possessed upon the founding of the Republic, their continuance as separate governmental entities seems assured. It is certainly not yet reasonable to expect their status to become similar to that of an English county or, still less, of a French department. Even if State power continues to decrease and federal control to grow, the American States will continue to possess authority to which no organ of local government in Britain can pretend. They will still possess an initiative in law-making which can be exercised in the absence of federal action in the field. It is they who will still be responsible for the functioning of local administrative and judicial machinery. Education, police, public health, welfare, and a host of other functions appear likely, at least on the local level, to continue to be administered by State officials. It is true that their activities may be subject to ever-increasing federal control. But their role will still be a large one, as compared with English organs of local government. The American States may be under constantly growing federal control; yet it is unlikely that they will ever have to look to Washington in determining their behavior, as every area of local government in England and Wales must look to Whitehall and Westminster if it becomes possessed of the desire to embark upon innovations."

A second chapter in this part discusses presidential prerogative and the steel seizure case. Another chapter deals with the changing role of the Supreme Court and the voluntary abdication of a large amount of the judicial supremacy which the Court exercised before 1937 in favor of a policy since then of greater judicial self-restraint. The Court's present role is seen as composed chiefly of two functions, first, as arbiter

of the competing demands of national and state power, and second, as the guardian of civil liberties. Another chapter discusses civil liberties and the cold war—the anti-sedition laws and the Smith Act, the "clear and present danger" test, the Communist trials, the loyalty and security programs, the increasing use of test oaths, and restrictions imposed upon aliens. There is a chapter on administrative law, with discussion of the delegation of legislative power, the Administrative Procedure Act of 1946, and the availability and scope of judicial review of administrative action. Another chapter deals with the United States and the United Nations, and is largely an analysis of the treaty power and the Bricker amendment to impose limitations upon it.

The chapter which will probably be of most interest to Mississippi lawyers is the one entitled "The Negro and the Law." The author states that "an American travelling outside the United States cannot help but be struck by the vast interest displayed in the position of the Negro in his country. . . . To the foreigner, the position of the Negro in the United States indicates that the American ideal of freedom and equality for all men is still far from complete realization. For this gap between ideal and reality, American law must take a portion of the blame. . . . One of the things which has made anti-Negro discrimination in the United States of such moment is the fact that it has been sanctioned by the law. With the legal prop removed, the discrimination itself can more easily be eliminated." Then follows a discussion of the cases dealing with the right of suffrage, restrictive covenants, and segregation. Professor Schwartz's concluding paragraph in this chapter is also interesting enough to quote:

"It can, of course, be asserted that decisions such as that in *Brown v. Board of Education* are in reality of little practical effect, for they do not reach the heart of the problem, the feelings of racial prejudice which still exist in the Southern American States. . . ." (One wonders if the author believes that feelings of racial prejudice exist only in the South.) "Yet, though the removal of the legal condonation of segregation will not necessarily abate individual and group predilections and prejudices, it cannot be denied that there is a vast difference between restrictions imposed by the State which prohibit the commingling of Negroes and members of the white race and the refusal of individuals to commingle where the State presents no bar. It has been the fact that segregation has had behind it the force of the law that has made it of such moment to the American Negro. It is because it eliminates the legal sanction that the decision of the Supreme Court in the *Brown* case is so important. Without the support of the law, segregation itself can hardly continue to be of such widespread consequence in the United States."

This book is apparently the outgrowth of two years which the author spent at Cambridge, for the author states in his preface that "it is the purpose of this book to present the workings of the American system of constitutional law to a British audience, with emphasis upon the significant changes that have occurred therein in recent years." As an attempt to bring understanding and knowledge where they did not exist before, this short, but surprisingly thorough, well-written, and interesting book will be valuable to American, as well as British, audiences.

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MISSISSIPPI EVIDENCE. By Taylor H. McElroy. Atlanta: The Harrison Company, 1955. Pp. 619. $20.00.

Taylor McElroy of Oxford, Mississippi, earned both his degree in science and his law degree at the University of Mississippi. Judge McElroy has had a distinguished career at the Bar and on the Bench. He was admitted to practice in the State of Mississippi in 1921 and practiced law for fourteen years prior to his election as Judge of the Third Circuit Court of Mississippi in 1935. He has been a member of the Mississippi House of Representatives, Mayor of the City of Oxford, City Judge, United States Commissioner, and has served as a faculty member of the University of Mississippi School of Law on several occasions.

It is always an important occasion for members of the Mississippi Bar when one of their number produces a significant contribution to the state's legal learning. There are many books available in which the law of our jurisdiction can be found after diligent search and inquiry, but there are few books which are annotated exclusively and exhaustively to our jurisdiction so as to provide a concise statement of the Mississippi law in a given field. Such is Judge McElroy's work in the field of evidence. Ready reference is always an important factor in preparing for trial, and many hours of legal research can be saved when the attorney has available Judge McElroy's *Mississippi Evidence*.

While substance is of the essence and quite frequently form becomes relatively unimportant, I find great satisfaction in both the content and the form of this book. The Table of Contents breaks the book down into fifteen chapters subsumed under six major parts. Each major part treats leading portions of the law of evidence. The book is convenient in size, and has a bold clear print that is a relief to the lawyer, who spends so many hours in reading. Full footnotes and citations are found throughout the book and the manner in which the cases are presented enables the user to determine the law of the cited case and its applicability to his factual situation. The book sets forth the various code sections dealing with evidence, has a complete Table of Cases and is well indexed.

It is important that the trial lawyer know the law of evidence, for few lawsuits are tried by applying the law to an admitted state of facts. The lawyer must know how to get into evidence the proof most favorable to his position and keep out as far as possible that which is damaging to his position. Judge McElroy has relieved the Mississippi lawyer who would search the Mississippi law of evidence of a most burdensome task, for every lawyer knows the almost inexhaustible list of cases to be found under "evidence" and under almost any subhead in general texts.

It can be said generally that evidence is largely a question of procedure and is governed by the law of the forum. However, since the federal rules of procedure make evidence admissible under either federal or state decisions, this book will also be of substantial assistance to the members of the Mississippi Bar who have occasion to try a case in a federal court.

While the law of the several states is the same, in many respects, there are always divergences which make it necessary to know the local practice. The law schools, perhaps of necessity, teach a universal law of evidence, but Judge McElroy's text, happily, gives us the particulars of the Mississippi law.

There is lacking—refreshingly so—any personal philosophy of the law of evidence which Judge McElroy may entertain. He has admirably accomplished a delineation of

the Mississippi law of evidence as it is by statute and decision. Judge McElroy has given us an excellent book which is a welcome addition to the library of every Mississippi lawyer.

Chester L. Sumners
Attorney at Law
Oxford, Mississippi

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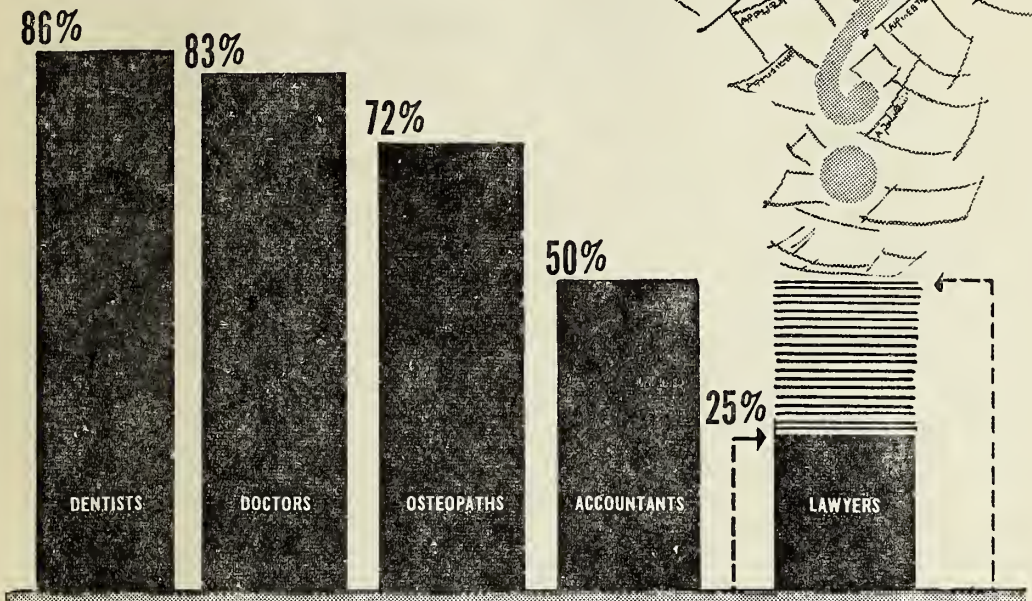

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